REYNOLDS
TRIAL EVIDENCE
AND
CROSS EXAMINATION
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TRIAL EVIDENCE

THE RULES OF EVIDENCE

AND OF THE

CONDUCT OF THE EXAMINATION OF WITNESSES

In Trials at Common Law and in Equity as Established in the United States, with the Reasons for Them,

A Concise Manual Adapted for Use at the Trial Table,

By WILLIAM REYNOLDS,
OF THE BALTIMORE BAR.

"As the rules which guide all legal questions are comparatively few, and the instances which depend on them are numberless, and only by chance will any future instance be like any one which has gone before, he [the successful lawyer] learned the rules and how to apply them and let the instances take care of themselves."—JOEL P. BISHOP.

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PREFACE

This work is an enlargement of a little book written by me and published twenty-seven years ago entitled The Theory of the Law of Evidence as established in the United States. Its object, as then stated in its preface, was "to provide for members of the bar and students an additional facility for acquiring such an accurate general knowledge of the rules of evidence and of the theory upon which they have been adopted as every lawyer must carry in his head in order to be able to try cases with justice to his clients." For this purpose it was undertaken to present, in the form of a brief treatise, the law of evidence as a complete scientific and rational system consisting of a series of rules, each one adopted for special reasons founded upon practical experience, but all directed to the common purpose of providing the best attainable method of getting at the truth in regard to controverted questions of fact with the highest degree of certainty compatible with the nature of judicial investigation. In doing this I endeavored to ordinarily supple-

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ment these rules by a statement of the reasoning upon which they were founded, as affording the best method of explaining the proper application of them in particular cases, since it is much easier to remember one reason which commends itself to the intelligence than to recall the decisions of the various cases that may seem most nearly analogous to the one on trial.

The work has been long used with acceptance by many practicing lawyers as a convenient *vade mecum* for the trial table, in which they can readily find a clear statement, supported by recognized authority, of the law applicable to almost any one of those questions of evidence which are at all likely to come up unexpectedly in the course of a trial. While a competent lawyer may in most cases be fully satisfied in his own mind as to what the answer to all such questions should be, he may at the same time often find himself unprepared to state clearly off-hand the why and wherefore of his opinion, or to furnish, without a greater delay than could be allowed him in the course of a trial, an adequate authority to sustain it. It is largely for the purpose of affording assistance to escape the embarrassment to which a lawyer would be otherwise subjected if the judge

should in such a case call for his authorities, that my book has been revised and added to, and is now offered to my brothers of the bar in its present form. It will, I think, upon examination, be apparent that there are not many of the questions of evidence likely to be raised unexpectedly in the course of a trial, for which there will not be found in this volume, if not a direct categorical answer, at least a well established rule bringing them within its terms, and clearly showing how they ought to be decided upon principle.

One question liable to be raised in every case at the conclusion of the plaintiff's testimony is, whether he has sustained the burden imposed upon him by law to produce evidence competent to prove *every* fact necessary to make out a *primâ facie* case in his favor—for if he has failed to do this, he may be nonsuited on motion of the defendant. It is therefore important for the plaintiff's counsel to know for a certainty at that time whether he has inadvertently omitted the proof of any fact required to be established by him, and equally important for the defendant's counsel to know whether every such fact has been established by competent evidence.

In Chapter I of Part III on the Burden

of Proof will be found a brief but comprehensive statement of all facts necessary to be proved, and of the character of the evidence by which they are usually established in almost every form of action likely to be brought in ordinary practice. Such information which belongs rather to the domain of substantive law than that of the law of procedure, is given sparingly if at all in most of the standard works on Evidence proper, and can generally only be found scattered about under various heads in the books on *nisi prius* practice or trial evidence. The convenience of having such a comprehensive statement at hand for ready reference at the trial table is obvious.

The increased use during the last quarter of a century of typewritten carbon duplicates, telegrams, telephone messages, photographs, sciographs or X ray pictures, and phonographic records, as instruments of evidence, has made it necessary for the trial practitioner to be familiar with the rules applicable to the admission of testimony of this character, and with the cases showing how the courts have applied these rules as occasions have arisen therefor. I have also endeavored to point out the principles on which all these cases have been decided with sufficient ful-

ness for practical use in discussing intelligibly before the court how they should be applied in the particular case on trial.

In fine the purpose of the work may be briefly summarized as an endeavor to place at the ready command of every practitioner whatever information about the law of evidence he is most likely to have need of for immediate use at the trial table.

WILLIAM REYNOLDS.

JUNE 1, 1911.

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THE RULES OF EVIDENCE AND OF THE CONDUCT OF THE EXAMINATION OF WITNESSES IN TRIALS AT COMMON LAW AND IN EQUITY

AS

ESTABLISHED IN THE UNITED STATES, AND THE REASONS FOR THEM.

TRIAL EVIDENCE.

INTRODUCTORY.

§ 1. Definitions.—As a judicial decision is nothing more than the application of the established principles of law to a given state of facts, it follows that whenever any tribunal pronounces a judgment it must necessarily assume the existence of certain facts. Unless the facts so assumed by the tribunal have taken place in its presence, it is obvious that it can acquire knowledge of their existence or non-existence only by means of information imparted to it upon the subject; and as it would be clearly impracticable to impose upon courts the labor of collecting such information in regard to every case brought before them, experience has shown that the most convenient as well as efficacious method of administering justice is that courts, in determining questions of fact, should always,

except in some matters hereafter to be noticed, be governed in making their decisions solely by such information as may have been produced before them by the parties to the proceeding in accordance with certain prescribed rules of law. If they were allowed to decide on impression or information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what ground the decision was rendered, but it might be founded on common rumor or something else equally untrustworthy, which the party to whose prejudice it operated would have had no opportunity of confuting.[1] The information thus imparted to the court upon which to found its decision is called EVIDENCE; and the rules regulating its admissibility, the method of its production, and its effects, constitute the LAW OF EVIDENCE.

§ 2. General division of the subject.— These rules of Evidence have been divided into three clases,[2] namely those relating to

[1] Best Ev., §§ 38, 88.

[2] This classification, which has been adopted by Sir Jas. F. Stephen in his India Evidence Act and his Digest of the Law of Evidence, commends itself as more logical than that made by any other writer on the subject.

I. Relevancy—by which is determined what facts may be received in evidence in any given case.

II. Proof—by which are defined the means whereby the existence or non-existence of relevant facts may be made apparent to the court.

III. Production and effect of evidence.

These will now be considered in their order.

PART I.

RELEVANCY.

CHAPTER I.

RULES OF ADMISSION.

§ 3. What are facts in issue.—Whatever facts are necessarily involved in any question submitted to a court for its determination are said to be "in issue," and evidence as to their existence or non-existence is always relevant. Thus in the trial of an indictment for murder, the facts that the deceased came to his death by other than natural means, that those means were put into operation by the accused, and that he was actuated by malice in so doing, are all facts in issue because they are all necessarily involved in the charge of murder. So, also, in a suit for damages for a tort, the commission of the wrong by the defendant, as well as the extent of the injury inflicted, and the loss occasioned to the plaintiff thereby, are facts in issue. Whenever any material fact is alleged in the pleadings

of a cause by either party and is denied by the other, that fact is "in issue;" but in order that a fact may be in issue it is not necessary that it be specifically alleged or denied in the pleadings; it is sufficient that it constitutes one of the component parts of a fact so alleged or denied.

§ 4. **Direct and indirect evidence.**—Facts in issue may be proved either by direct evidence, or by indirect, otherwise called circumstantial evidence. By direct evidence of a fact is meant the statements of persons who have perceived its existence by means of their senses, or the production of the thing itself before the court, where the fact to be proved is its present existence or condition. By indirect evidence is meant the proof of some other fact or facts from which, taken either singly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence. Facts not directly in issue, but which may be proved for the purpose of establishing the existence or non-existence of any fact in issue, are called "facts relevant to the issue." These facts relevant to the issue may be proved either by direct or indirect evidence in the same manner as a fact in issue, and so also may any facts which are relevant

to prove them, unless in the opinion of the judge the facts offered for this purpose are too remote from the issues on trial to be material.[3]

§ 5. Facts not directly in issue, but relevant thereto.—Whenever any fact or series of facts would, if true, *conclusively* establish the existence or non-existence of any fact in issue, or of any fact relevant thereto, such fact or series of facts is always relevant, and proof thereof may be given in evidence; but when the effect of proving a fact offered in evidence would only be to render more or less probable the existence or non-existence of a fact in issue or relevant thereto, then the question of its admissibility becomes one of much more difficulty, and must be determined by the sound discretion of the judge under all the circumstances of the case, according to the degree of light which it would throw upon the matter in issue, subject, however, to certain established rules by which some classes of facts are required to be always admitted as relevant while some other classes are excluded as irrelevant.

§ 6. Rules to determine the relevancy of

[3] Ste. Dig., art. 2; Tay. Ev., § 316; Alexander v. United States, 138 U. S., 353, 356.

certain classes of facts not directly in issue.— These rules are to a certain extent arbitrary, and are mostly founded upon the result of practical experience rather than based upon any strict logical theory. This is necessary from the fact that *absolute* certainty as to any fact is unattainable by means of human evidence, except perhaps in some cases where the matter is apparent to our own senses. In every other case the most that can be attained is *moral* certainty, which has been defined as such a high degree of probability as would justify a prudent man under the circumstances of the case in acting upon it as if it were an absolute certainty. It therefore follows that moral certainty is a question of prudence rather than of calculation, and consequently the only practical rules that can be formulated as to the relevancy of those facts from the existence of which a fact in issue may be probably inferred, are mere enumerations, on the one hand, of certain classes of facts which have been ascertained by experience to be capable of supporting an inference as to other facts sufficiently probable to be the foundation of a legal judgment, and on the other hand, of certain other classes of facts from which no inference could be drawn, carrying with it such a high degree of prob-

ability as would justify any court in making it the basis of its decision.

§ 7. Res Gestae, or facts forming part of the same transaction; statements accompanying an act; conspiracy.—We will first proceed to consider those rules which define the classes of facts that are considered relevant. As it is the general practice of mankind to judge of the probability of an alleged event by considering the circumstances under which it is said to have taken place, and as these attending circumtsances often afford the best interpretation of the meaning, purpose and character of an action, it has been laid down as a well settled rule, that *all facts so intimately connected with the facts in issue as to form part of the same transaction or subject matter must be deemed relevant to it.*[4] Such facts are sometimes called *res*

[4] Ste. Dig., art. 3. No authoritative rule of law of general application has yet been stated to determine whether any particular facts are or are not parts of the same transaction with the facts in issue. See Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S., 99, 105; People v. Vernon, 35 Cal., 49; 95 Am. D., 1, note; Augusta Factory v. Barnes, 72 Ga., 217; 53 Am. R., 836; Little Rock, etc., Ry. Co. v. Leverett, 48 Ark., 333; 3 S. W. 50; 3 Am. St. R., 230, and note; Ward v. White, 86 Va., 212; 9 S. E. 1021; 19

gestae, and whenever the fact in issue is the doing of any act, they include all accompanying statements made by the actors in so far as calculated to explain their own actions, "for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act."[5] It must be kept in mind, however, that this rule only extends to statements made simultaneously with the doing of the act which they are thus deemed relevant to explain. So, also, whenever the bodily or mental feelings of an individual are relevant to the issue, the usual expressions

Am. St. R., 883; Pinney v. Jones, 64 Conn., 525, 527; 30 A. 762; 42 Am. St. R., 210; Barker v. St. Louis, etc., R. R., 126 Mo., 143; 28 S. W. 866; 26 L. R. A. 843; 47 Am. St. R., 646. See, also, Prof. J. B. Thayer's article in Am. Law Record, vol. XIV, p. 819, and XV, p. 1, on Reg. v. Beddingfield (1879); also, Kirby v. Com., 77 Va., 681; 46 Am. R. 747. Contra, People v. Ah Lee, 60 Cal., 85. Sudden exclamations and outbursts by the by-standers helo part of res gestæ. O'Rourke v. Citizens' Street Ry., 103 Tenn., 124; 52 S. W. 872; 46 L. R. A. 614; 76 Am. St. R., 639.

[5] 1 Star. Ev., *87; 1 Gr. Ev., § 108; Ste. Dig., art. 8; 1 Elliott Ev., § 154.

of such feelings made at the time are admissible in evidence. Thus, the declarations of a party himself are received to prove his condition, ills, pains and symptoms, whether arising from sickness or from an injury by accident or violence, but they must be confined strictly to such complaints, expressions and exclamations as furnish evidence of a *present* existing pain or malady, and are made contemporaneously or nearly so with the main event alleged as its cause. Anything in the nature of narration must be excluded.[6]

Under this rule admitting the *res gestae* in evidence, whenever two or more persons are

[6] See Insurance Co. v. Mosley, 8 Wall., 397, where this whole subject is fully discussed. By the ruling in this case, which has been much criticized, the declarations of a party, since deceased, that he had been injured by a fall down stairs, were admitted in evidence, although not made until after his return to his room subsequent to the alleged accident; the rule of law laid down in the opinion corresponds, however, with that in the text, the words "contemporaneously or nearly so" being somewhat liberally construed. See, also, Ohio & Miss. R. R. Co. v. Stein, 133 Ind. 243; 32 N. E., 831; 19 L. R. A., 733 and note; Christopherson v. Chicago, etc. R. R. Co., 135 Iowa, 409, 415; 109 N. W., 1077; 124 Am. St. R., 284, 290.

charged with conspiring together to commit any offense or actionable wrong, after evidence sufficient in the opinion of the court to establish *primâ facie* the fact of conspiracy between the parties has first been given, then everything said, done or written in execution or furtherance of the common purpose by any one of those thus shown to have participated in such conspiracy, is relevant in all proceedings against any or all of the other conspirators as well as against himself, because it is considered under these circumstances to form a part of the same transaction in which they were all engaged and which is the subject-matter of inquiry in all such proceedings. It must be borne in mind, however, that this only applies to words spoken while actually engaged in the execution or furtherance of the objects of the conspiracy. Anything in the way of a narrative of what had been done or spoken while so engaged does not come within the category of *res gestae,* and is therefore only relevant as against the narrator and such others of the conspirators as were present and within hearing when he related it.[7]

[7] Ste. Dig., art. 4; 1 Gr. Ev., § 111; Tay. Ev., § 590, etc.; Am. Fur Co. v. United States, 2 Pet.,

§ 8. Facts showing probable cause for existence or non-existence of fact in issue; Opportunity.—As experience has shown that all effects are the result of some cause, and that like causes generally produce similar effects, all facts which, if true, would afford a probable cause for the existence or non-existence of a fact in issue, or which would show that the person alleged to have done any act, the doing of which is a fact in issue, had or had not any motive for or intention of doing such act, or did or did not make any preparation for so doing, are generally considered relevant.[8] So, also, of any facts which would show that an opportunity existed for the doing of any act constituting a fact in issue or relevant thereto.[9]

358, 365; Lincoln v. Claflin, 7 Wall., 133, 139; Nudd v. Burrows, 91 U. S., 426, 438; Logan v. United States, 144 U. S., 263, 309; Brown v. United States, 150 U. S., 93, 98; Sparf & Hansen v. United States, 150 U. S., 51, 56; Spies v. People, 122 Ill., 1; 12 N. E. 865; 17 N. E., 898; 3 Am. St. R., 320.

[8] Ste. Dig., art. 7; also, App., note 1; R. v. Clewes, 4 C. & P., 221; Carlton v. People, 150 Ill., 181, 187; 37 N. E. 244; 41 Am. St. R., 346, 350; State v. Lapage, 57 N. H., 245; 24 Am. R., 69; Grand Trunk R. R. Co. v. Richardson, 91 U. S., 454, 470.

[9] Ste. Dig., art. 9; R. v. Donellan, Wills, Circ. Ev.,

§ 9. **Ordinary course of business.**—Upon this ground the existence of any regular course of business according to which a particular act would naturally have been done is relevant to show that such act was done; thus, in order to show that a letter was posted, it is relevant to prove that it was put into a certain place, and that it was the ordinary course of business for all letters put there to be carried to the post.[10]

§ 10. **Natural effects likely to have been produced by existence or non-existence of facts in issue; complaints; facts showing animus; similar occurrences showing intention.**—So. also, proof of any facts which would be the

192; Clark v. Fitch, 2 Wend., 460; 20 Am. Dec., 639; Dowell v. Guthrie, 99 Mo., 653, 665; 12 S. W. 900; 17 Am. St. R., 598; McCoy v. Trucks, 121 Ind., 292; 23 N. E., 93. See sec. 130 post as to experiments.

[10] Ste. Dig., art. 13; 1 Gr. Ev., §§ 38, 40; Lindenberger v. Beall, 6 Wheat., 104; Skillbeck v. Gorbett, 7 A. & E., N. S. (7 Q. B.), 846; Hall v. Brown, 58 N. H., 96; Hedden v. Roberts, 104 Mass., 38; 45 Am. R. 276; Rosenthal v. Walker, 111 U. S., 185, 193; Henderson v. Carbondale Coal Co., 140 U. S., 25, 56; Schultz v. Jordan, 141 U. S., 213. As to telegrams, Epping v. Scott, 112 Cal., 369; 42 P., 301; 44 P., 723; 53 Am. St. R., 226; Perry v. German Am. Bank, 53 Neb., 89; 73 N. W., 538; 68 Am. St. R., 593.

natural and probable effect or result of the existence or non-existence of any fact in issue is admissible in evidence as relevant thereto.[11] Thus, where the question is whether a certain act was done by A., any subsequent conduct of A., apparently influenced by the doing of that act, or anything done by him or by his authority in consequence of it, is relevant.[12] And in criminal cases possession of the fruits of crime,[12a] and where an injury is alleged to have been done to a person, his subsequent conduct, and in particular the fact that he made complaint soon after the offense to persons to whom he would naturally complain, are relevant; but the terms of the complaint itself are generally considered to be irrelevant.[13] So, also, where

[11] See India Ev. Act, § 7; Aveson v. Lord Kinnaird, 6 Ea., 188; Greenfield v. People, 85 N. Y., 75; 39 Am. R., 636; Brewing Co. v. Bauer, 50 Ohio St., 560; 35 N. E., 55; 40 Am. St. R., 686; Hodge v. State, 98 Ala., 10; 13 So., 385; 39 Am. St. R., 1.

[12] Ste. Dig., art. 7; Com. v. Webster, 5 Cush., 295; 52 Am. Dec., 711; Furnas v. Durgin, 119 Mass., 500, 508.

[12a] Wilson v. U. States, 162 U. S., 613; State v. Brady, 121 Iowa, 561; 12 L. N. S., 199.

[13] Ste. Dig., art. 8; Bacio v. People, 41 N. Y. (2 Hand), 265; Oleson v. State, 11 Neb., 276; 38 Am.

the fact in issue is the existence in any person, of any state of mind such as intention, knowledge, good faith, negligence, rashness, or ill will or good will towards any particular person, any facts which appear to be the natural and probable manifestations of such a state of mind are relevant as proof of its existence at the time when they happened.[13a] Thus, where the question is whether an act done by A. was committed with a fraudulent intent, his fraudulent conduct to third parties in similar transactions about the same time is a relevant fact to show his *animus;*[14] and so, also, where there is a question as to whether an act was accidental or intentional. The fact that such an act formed part of a series of similar occurrences, in each of which the per-

Rep., 366; People v. O'Sullivan, 104 N. Y., 481; 58 Am. R., 530; 10 N. E., 880; 1 Elliott Ev., § 162.

[13a] India Ev. Act, § 14; Ste. Dig., art. 11; 1 Gr. Ev., § 53; Tay. Ev., §§ 338-345; Mut. Life Ins. Co. v. Hillmon, 145 U. S., 285, 295; Com. v. Trefethen, 157 Mass., 180; 31 N. E., 961.

[14] McAleer v. Horsey, 35 Md., 439, 461; Bottomly v. United States, 1 Story, 135; 3. Fed. Cas., 968; Castle v. Bullard, 23 How., 172; Lincoln v. Claflin, 7 Wall., 457, 464; N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S., 591.

son doing the act was concerned, is a relevant fact to show intention on his part.[15]

§ 11. Facts explanatory of relevant facts. —Another ground of the relevancy of facts not directly in issue is their being necessary to be known in order to explain or introduce facts in issue or relevant facts, or to support or rebut an inference suggested by a fact in issue or relevant fact, or to establish the identity of any thing or person whose identity is relevant, or to fix the time or place at which any fact in issue or relevant fact happened, or to show the relation of parties by whom any such fact was transacted; and accordingly such facts are admissible in evidence in so far as they are necessary for these purposes.[16] This class of evidence is admitted for the same general reasons which apply to

[15] Ste. Dig., art. 12; Dunn's Case, 1 Moo. C. C., 146; R. v. Cooper, L. R. 1 Q. B. D. (C. C. R.), 19; Bottomly v. United States, 1 Story, 135; 3 Fed. Cas., 963, 971; Wood v. United States, 16 Peters, 342, 360; N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S., 591; Com. v. Eastman, 1 Cush., 189; 48 Am. D., 596.

[16] India Ev. Act, § 9; Ste. Dig., art. 9; R. v. Lord Geo. Gordon, 21 St. Tr., 520; Bank v. Kennedy, 17 Wall., 19, 24; People v. Vernon, 35 Cal., 49; 95 Am. D., 1, note; 1 Elliott Ev., § 155.

the *res gestae,* but it includes a great variety of facts which, on account of difference in time and place, and for other reasons, could not be classed as parts of the same transaction as the facts in issue to which they relate, although equally necessary to explain and render them intelligible, and which it would often occasion a great failure of justice to exclude from consideration in the determination of such facts in issue.[17]

[17] When the question in issue is whether a certain effect was produced by a specific cause, the rule is now established that evidence is admissible of the result of tests or experiments based upon conditions essentially similar to those existing in the case on trial. Burg v. Chicago, etc. Ry. Co., 90 Iowa, 106, 117; 57 N. W. 680; 48 Am. St. R., 419, 427. But it must first be shown that the conditions of the experiment were practically identical with those of the case in controversy. See Chicago, etc. R. R. Co. v. Champion, 9 Ind. App., 510, 514; 36 N. E., 221; 37 N. E., 21; 53 Am. St. Rep., 357, 361, and extended note on p. 375. Permitting experiments or tests to be made before the jury whether in or out of the court-room rests largely in the discretion of the trial courts. United States v. Ball, 163 U. S., 662, 673; Com. v. Brelsford, 161 Mass., 61; 36 N. E., 677; Hatfield v. St. Paul, etc. Ry. Co., 33 Minn., 130; 22 N. W., 176; 53 Am. R., 14. See, also, sec. 130 *post.*

CHAPTER II.

RULES OF EXCLUSION.

§ 12. Res Inter Alios; facts not directly in issue, nor relevant thereto as above stated, are inadmissible.—All facts not in issue themselves, and not connected with some fact in issue, or relevant thereto in some one of the above four ways, namely, either as forming part of the same transaction or subject matter; or as constituting a probable cause for it; or as the natural effect of it; or as necessary to explain or introduce it, are inadmissible in evidence for the purpose of forming the ground of an inference that such fact in issue or relevant fact probably did or did not exist,[1] and are frequently designated, somewhat loosely, by the term, *res inter alios,* a phrase originally derived from the maxim *res inter alios acta alteri nocere non debet,* but which is often used by the bench and bar

[1] Ste. Dig., art. 10 and note VI; Holcome v. Hewson, 2 Camp., 391; State v. Lapage, 57 N. H., 245; 24 Am. R., 69; Gehagan v. Boston, etc., R. R., 1 Allen, 187; 79 Am. D., 7324.

in the sense of irrelevant.[2] This principle, that courts are not at liberty to infer from one fact the probable existence or non-existence of another fact merely because the two are similar, unless they can be first shown to be part of the same transaction, or to be connected together in some way by the chain of cause and effect, is one of the most distinguishing characteristics of the English law of evidence. It stands in marked contrast with the practice which prevails among some of the continental nations of Europe, where in criminal cases it is customary for the prosecution to collect and set out before the tribunal before which the case is tried, a detailed history of the entire previous life of the accused, in order that it may judge therefrom of the probability of his having been guilty of the offense with which he is charged.

§ 13. Not all facts connected with another by way of cause and effect necessarily relevant thereto.—Although the relevancy of any given fact to prove the existence or non-existence of any other fact must be determined mainly by the rules of logic it must not be supposed that every fact which may be logically connected with another, either in the way of

[2] Tay. Ev., § 317.

cause or effect, is therefore necessarily admissible in evidence as relevant to prove or disprove it. To render it admissible for that purpose it must appear as a *probable* cause or effect, and the degree of probability which will entitle it to the consideration of a judicial tribunal is a question to be decided by the discretion of the judge in view of all the circumstances of the particular case on trial.[3]

§ 14. Character, hearsay and opinion generally irrelevant.—There are also three kinds of facts, namely, character, hearsay, and opinions, which the law expressly declares to be irrelevant, except in certain specified cases, as the grounds for inferring the existence or non-existence of other facts; although in the common occurrences of life we often consider a man's character as furnishing sufficient cause for an inference that he did or did not do a certain thing which is imputed to him, and we frequently think that the facts of a truthful person having said a thing, and of a cautious person having believed it, are effects which could scarcely have been produced by

[3] Sec. 5, ante; Alexander v. United States, 138 U. S., 353, 356; 1 Wigm. Ev., §§ 10, 28a.

any other cause than the actual happening of the thing so said or believed to have happened.

§ 15. Character irrelevant excepting in favor of a person indicted criminally, or where directly in issue.—The rule of law as to the relevancy of character is that the fact of a person having a good or bad character (in the sense of reputation) is not admissible in evidence as the ground for an inference that he did or did not do a certain thing, excepting that in criminal cases the accused may show that he has a good character as a fact from which the jury may infer that he is not guilty of the crime or misdemeanor for which he is indicted. Of course when this fact of character is put in evidence by the accused it may be contradicted like any other fact, and the prosecution may show that he had not a good character by proof that he had a bad one.[4] The reason for this rule and its exception may probably be explained, partly, by the

[4] Ste. Dig., art. 55; 1 Tay. Ev., §§ 347-361; Atty. Genl. v. Bowman, 2 Bos. & Pul., 532; State v. Lapage, 57 N. H., 245; 24 Am. R., 69; Fowler v. Ætna Life Ins. Co., 6 Cowen, 673, 675; 16 Am. D., 460; Simpson v. Westenberger, 28 Kan., 756; 42 Am. R., 195; Porter v. Seiler, 23 Pa. St., 424; 62 Am. D., 341; 1 Elliott Ev., § 167-171.

fact that while in our daily experience it is no unusual thing to find men occasionally acting in a manner very inconsistent with their general character, it is extremely rare to find that a person who has always maintained a good reputation in the community will be willing to forfeit at once all claims to future respectability by the commission of an offense that would subject him, if discovered, to the danger and disgrace of a criminal prosecution ; and partly by that solicitude of the common law to give the accused, in criminal cases, the benefit of every reasonable doubt, which most likely had its origin in that period of English history when almost every felony was punished with death, and the counsel for the accused was not permitted to argue in his defense before the jury. Whenever the question as to whether a person has a good or bad character is itself a fact in issue,[5] as in the case of an action for defamation where the defendant justifies, or where it becomes relevant in order to determine the amount of damages which the plaintiff

[5] 1 Gr. Ev., § 54; Tay. Ev., § 355; Ruan v. Perry, 3 Caines, 120; O'Bryan v. O'Bryan, 13 Mo., 16; 53 Am. D., 128; Cleghorn v. N. Y. & H. R. R. R., 56 N. Y., 44; 15 Am. R., 375; 1 Elliott Ev., § 169.

should recover,[6] such person's character may always be proved in evidence like any other fact in issue or relevant fact.

§ 16. Hearsay excluded except in certain cases.—One of the most important of the rules of evidence in regard to relevancy is that which is frequently summarized by the maxim "Hearsay is no evidence," but which may be more accurately given thus: The fact that a statement has been made by a person not called as a witness, or is contained in any book, document or record whatever, proof of which is not admissible on other grounds, is not relevant as a fact from which the truth of the fact stated may be inferred, except in certain cases hereinafter mentioned.[7] This rule is not applicable, as already intimated, to the case of words or exclamations accompanying an act which are received in evidence as part of the *res gestae,* or to such as are offered merely as indicative of the actual state of mind or feeling of the

[6] Stone v. Varney, 7 Metc., 86; 39 Am. D., 762; Gore v. Curtis, 81 Me., 403; 17 A. 314; 10 Am. St. R., 265; Miller v. Curtis, 158 Mass., 157; 32 N. E., 1039; 35 Am. St. R., 469; Pease v. Shippen, 86 Pa. St., 305; 21 Am. R., 116.

[7] Ste. Dig., art. 14; Mima Queen v. Hepburn, 7 Cr., 290, 295; Hopt v. Utah, 110 U. S., 574, 581.

person using them at the time when they were uttered, but refers solely to narratives of past occurrences.

§ 17. Reasons for the rule excluding hearsay.—The reasons for the rule excluding hearsay, or, as Mr. Best more accurately terms it, "derivative evidence,"[8] are not difficult to discover, for apart from the circumstance that the probabilities of falsehood and misrepresentation, either wilful or unintentional, being introduced into a statement are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely ever been made under the safeguards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy. It is indeed true, that, in the ordinary affairs of life, men often act upon information received at second hand, but this is seldom done in matters of much importance, unless either they or their informants possess sufficient personal knowledge of the party from whom the statement originated to form an intelligent estimate of his general disposition to speak the truth, the temptation he may be under to deceive, and

[8] Best on Ev., §§ 29, 30, 51, 493-5.

his probable means of accurate information in regard to the subject-matter of his statement. Such personal knowledge the courts can rarely possess, and therefore three tests have been provided, to which, in general, all statements must be subjected before being admitted as evidence in judicial proceedings. These are: 1. That the statement must be made under the moral obligation of a solemn oath or affirmation, with the liability to a criminal prosecution for perjury in case of falsehood. 2. That the party against whom the testimony is given shall have the opportunity of cross-examining the witness, in order to elicit his sources of information as well as any material facts within his knowledge which he may not be disposed to disclose voluntarily, and also to test the general accuracy of his statements, and to show if he has any bias in regard to the matter in dispute. 3. That the witness should give his testimony in open court, in order that the jury may observe his demeanor while giving it.

§ 18. **Two classes of exceptions to the rule.** —The exceptions to the rule excluding hearsay or derivative evidence may be divided into two classes. The first class (A) includes statements made under circumstances which

render the three tests above mentioned superfluous, namely:

1. Admissions.
2. Statements in public documents.
3. Statements in judicial records.
4. Statements showing the existence of a general reputation in cases where the existence of such reputation is a relevant fact.

The second class (B) includes statements to which some one or more of the three tests cannot be applied by reason of the death or inability to testify of the person who made them, but which were made under certain conditions affording sufficient proof of their truth to justify their reception as evidence without being subjected to such tests. Such statements are generally called declarations, and the person who made them a declarant. They are as follows

1. Evidence given in a proceeding between the same parties or their privies.
2. Dying declarations as to cause of death.
3. Declarations made in the course of business or professional duty.
4. Declarations against the interest of the declarant.
5. Declarations of testator as to contents of his will.
6. Declarations as to public or general rights.

7. Declarations as to matters of pedigree.

In the United States, insanity, and, in some cases, even permanent absence from the state, have been held to have the same effect as death in rendering the declarations of such insane or absent person admissible; but the decisions of the courts of different states conflict as to the admissibility of declarations made by persons absent from the state.

These several exceptions to the rule excluding hearsay will now be considered seriatim in the order above given.

§ 19. (A.) First class of exceptions; admissions.—An admission [9] is a statement, oral, written, or by tacit acquiescence,[10] suggesting any inference as to any fact in issue or relevant thereto, made by or on behalf of any party to any proceeding, and is (subject to the rules hereinafter stated) relevant as against the person by or on whose behalf it was made, but not in his favor unless admissible in evidence for some other reason, but in divorce suits and other proceedings for judgments *in*

[9] Ste. Dig., art. 15; 1 Elliott Ev., §§ 220-242.

[10] Gr. Ev., § 197; Tay. Ev., § 809; 2 Whar. Ev., § 1136; Wiggins v. Burnham, 10 Wall., 129; Turner v. Yates, 16 How., 14, 27; Allison v. Barrow, 3 Cold., 414; 91 Am. D., 291.

rem such admissions are not conclusive, as other parties have interests in the case which cannot be concluded by the party making them. (See sections 36, 37, 57 *post*). That such admissions, when offered in evidence against the party by whom they have been made, should be received as against such party without being first subjected to the three tests above mentioned, is almost self-evident.[11] For these tests, being designed merely as safeguards to protect the parties to the suit from the introduction of false testimony, cannot fairly be invoked by the party who made the admission for the purpose of proving his own falsehood, and the other party by offering the admission expressly waives all claim on his part to have the three tests, or any of them, applied to it. The fact that such admissions are against the interest of the party who made them, always raises a very strong presumption that they are true, and notwithstanding that it sometimes happens that a party makes a false statement, which he believes at the time to be for his own advantage, although it afterwards

[11] In proceedings for divorce such admissions are not conclusive, as the public has an interest in the case to prevent collusion.

turns out to the contrary, yet even under such circumstances it is no more than right that the fact of his having made such a statement should be given in evidence, if for no other purpose, at least to throw upon him the burden of explaining it, and thereby showing his disposition to depart from the truth when he considers that his interests will be subserved by such a course.

§ 20. How admissions may be made.—Such admissions, as already stated, may be made not only by the oral or written statements of the party himself but by his tacit acquiescence in the statements of others made in his presence and hearing; and it is upon this ground that whatever is said by anyone whomsoever in regard to the matter in controversy, in the presence and hearing of a party to the suit, is in general admissible in evidence to show his acquiescence therein, if offered by his adversary. In order, however, for his silence in such cases to warrant the inference of acquiescence on his part, it must not only appear that the language used was fully understood by him, but also that the circumstances were such as afforded him an opportunity to speak, and such as would properly and naturally call for some reply from a person sim-

ilarly situated.[12] Conversations by telephone, when the parties can recognize each other's voices, are admissible in evidence to the same extent as other conversations.[13]

§ 21. The whole of a statement made at the time must be considered.—When the statement of a party is offered in evidence as an admission, fairness requires that everything he said at the time relating to the same subject-matter should be received and consid-

[12] Gr. Ev., § 197; Tay. Ev., § 809; 2 Whar. Ev., § 1138; Corser v. Paul, 41 N. H., 24; 77 Am. D., 753; Brainard v. Buch, 25 Vt., 573; 60 Am. D., 291.

[13] Murphy v. Jack, 142 N. Y., 215; 40 Am. St. R., 590. Conversations held through telephone at a person's office admitted although voice not recognized. Mo. Pacific Ry. v. Heidenheimer, 82 Tex., 195; 17 S. W., 608; 27 Am. St. R., 861; Knickerbocker Co. v. Gardiner Co., 107 Md., 556, 571; 69 A. 405. Also conversation over telephone through operators in the presence of persons whose words they repeated. Sullivan v. Kuykendall, 82 Ky., 483; 56 Am. R., 901; Oscamp v. Gadsden, 35 Neb., 7; 52 N. W., 718; 37 Am. St. R., 428; but see Willner v. Silverman, 109 Md., 341, 360; 71 A. 962. Also Bennett v. Magner, 105 Minn., 118; 117 N. W., 245; 127 Am. St. R., 531, with full note pp. 538-557. Acknowledgment of deed through telephone by married woman held good. Banning v. Banning, 80 Cal., 271; 22 P., 210; 13 Am. St. R., 156.

ered together with it, in order to understand his true meaning, yet it does not follow that the whole statement is equally worthy of credit; and it is therefore for the jury to consider, after hearing it all, how much they are, under the circumstances, warranted in accepting as true.[14]

§ 22. Party bound by the admissions of—(a) his privies; (b) those whose interests he represents; (c) those jointly interested with him; (d) those whom he has authorized to make admissions, or to whom he has referred a party for information.—The same reasoning which renders a party's own admissions receivable in evidence against him applies equally to those made on his behalf by others, for whose acts, done at the time such admissions were made and relating to the same subject-matter, he would be held responsible. Such persons are:

(a) Those under whom the party claims, as privies in blood, privies in law, or privies in estate, as the case may be.[15] Thus, the ad-

[14] 1 Gr. Ev., § 201; Tay. Ev., § 725; Queen Caroline's Case, 2 Brod. & B., 297; Prince v. Samo, 7 Ad. & E., 627; Insurance Co. v. Newton, 22 Wall., 32; Rouse v. Whited, 25 N. Y., 170; 82 Am. D., 337.

[15] 1 Gr. Ev., §§ 189, 190; Tay. Ev., §§ 787, 788—privies in law; Eckert v. Triplett, 48 Ind., 174; 17

missions of an ancestor in regard to the title of lands owned by him, are received in evidence against his heir in an action concerning the same property; those of a vendor, made while the owner of the thing sold, are admissible against his vendee; those of a landlord, against his tenant, and those of a testator or intestate, against his executors or administrators.

(b) Those whose interest the party represents, as a principal for whose benefit the action has been brought by an agent, the *cestui que trust* of a trustee, or one to whose use a suit has been entered, or who is in fact the real plaintiff or defendant, although his name does not appear on the record. In this class of cases the admissions are only receivable in evidence when their effect would be confined to the interest of the party who actually made them and those who claim through him.[16] Thus in a case where an action was brought by trustees representing the

Am. R., 735—privies in blood; Spalding v. Hallenbeck, 35 N. Y., 204—privies in estate; Pool v. Morris, 29 Ga., 374; 74 Am. D., 68; 1 Ell. Ev., §§ 243-270.

[16] 1 Gr. Ev., § 180; Tay. Ev., §§ 756, 757; Bridges v. Eggleston, 14 Mass., 245, 250-57; 7 Am. D., 209; Babb v. Clemson, 10 S. & R., 419; 13 Am. D., 684.

interests of several *cestuis que trust,* the statements of the person beneficially interested as tenant for life were not received as evidence for the defendant so as to prejudice the rights of the remainderman in fee.[17] And so, also, an admission made by a party to the suit who sues in a representative character merely, must, in order to be received in evidence, be made while he is clothed with that character.[18]

(c) Those who are jointly interested with a party to the suit, as his partners or joint contractors with him. But it by no means follows that, because two persons have a common interest in the same subject-matter, they can therefore make admissions respecting it against each other. To enable them to do this, not only must their interest be joint, but the admissions must be made during the continuance of the joint interest.[19] Thus, accord-

[17] Tay. Ev., § 757; Doe v. Wainwright, 8 A. & E., 691, 699, 700.

[18] Tay. Ev., § 755; Ste. Dig., art. 16; Mason v. Poulson, Adm'r, 40 Md., 355, 365; 1 Ell. Ev., § 261.

[19] Ste. Dig., art. 17; 1 Gr. Ev., §§ 174, 176; Tay. Ev., § 750; Mandeville v. Welch, 5 Wheat., 277, 283; Padgett v. Lawrence, 10 Paige, 170, 180; 4 Am. D., 232; 1 Elliott Ev., § 246.

ing to the weight of American authority,[20] admissions made by a partner after the dissolution of the partnership, relating to matters done during its existence, are inadmissible against the other partner; and so, also, in cases in which actions founded on a contract have been barred by the statute of limitations, no joint contractor or his personal representative loses the benefit of such statute by reason only of any acknowledgment or promise, or payment of any principal, interest or other money, by any other or others of them, made after the period of limitation has expired.[21]

(d) Those whom the party has either expressly or by his conduct authorized to make admissions on his behalf. This class includes counsel and attorneys of record while engaged in the actual management of the cause, either in court[22] or in correspondence relating thereto, and agents of every kind; but unless the latter have been expressly author-

[20] Whar. Ev., § 1196, and note; Baker v. Stackpoole, 9 Cow., 420, 423; 18 Am. D., 508.

[21] Ellicott v. Nichols, 7 Gill, 85, 96; Bell v. Morrison, 1 Pet., 351, 367.

[22] Oscanyan v. Arms Co., 103 U. S., 261; Pratt v. Conway, 148 Mo., 291, 299; 40 S. W., 1028; 71 Am. St. R., 602, 607.

ized to make them, their admissions are only receivable in evidence when shown to have been made in reference to business about which they were employed at the time, and which was within the scope of their authority.[23] This class also includes persons to whom a party to the proceedings has expressly referred another for information concerning a matter in dispute, whose statements are received as admissions of the party who so referred to them, since by such reference the party has, in effect, adopted their statements as his own.[24] But the admissions of a principal are not receivable in evidence against his surety, as to matters for which the latter has given security, unless made during the transaction of the business for which the surety is bound, so as to become part of the *res gestae*.[25] Thus, if one becomes

[23] Ste. Dig., art. 17; Cliquot's Champagne, 3 Wall., 114, 140; United States v. Brig Burdett, 9 Pet., 682, 687; Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S., 99, 104; Stiles v. W. R. R. Co., 8 Metc., 44; 41 Am. D., 486. See, also, 91 Am. D., note p. 493.

[24] 1 Gr. Ev., § 182; Tay. Ev., § 760; Allen v. Killinger, 8 Wall., 480; Turner v. Yates, 16 How., 14, 28; Chapman v. Twitchell, 37 Me., 59; 58 Am. D., 773.

[25] 1 Gr. Ev., § 187; Tay. Ev., § 785; Ste. Dig., art. 17; Chelmsford Co. v. Demarest, 7 Gray, 1; Stetson

surety on a bond conditioned for the faithful performance of another as clerk or collector, and the latter, after being dismissed, makes statements as to sums of money which he has received and not accounted for, these statements are not relevant as admissions against the surety, although with regard to entries made by such clerk in the course of his duty, and before his dismissal, it is otherwise.[26]

§ 23. Offer of compromise not an admission.—No offer made by either party by way of compromise, or to buy peace, can be given in evidence in any civil action as an admission by him, if it was made either upon the express condition that evidence of it should not be given, or under circumstances from which the judge infers that such was the understanding between the parties.[27] This rule is

v. City Bank, 2 Ohio St., 167, 175; Blair v. Perpet. Ins. Co., 10 Mo., 559; 47 Am. D., 129.

[26] Ibid. But a judgment recovered in an action against the principal is admissible, and in some cases conclusive evidence of the amount for which his surety is liable in an action against the latter. Drummond v. Prestman, 12 Wheat., 519; Stovall v. Banks, 10 Wall., 583; 2 Whar. Ev., § 770.

[27] Ste. Dig., art. 20; 1 Phil. Ev., 4th Am. ed., p. 147, note; 1 Gr. Ev., § 192; Home Ins. Co. v. Balt.

grounded upon public policy and convenience, for without it parties would never be safe in taking any steps towards an amicable adjustment of their differences; but it is confined solely to offers of compromise as such, and, therefore, when, during a treaty of compromise, either party admits any independent fact merely because he recognizes it to be true, such admission may be afterwards received in evidence against him.[28]

§ 24. Admissions made under duress excluded.—Admissions made under duress or circumstances of constraint are not admissible in evidence, but there is a distinction taken between civil and criminal cases as to what constitutes duress. In the former no amount of legal compulsion is held to be such duress as will exclude admissions made by a party to the proceeding;[29] but no confes-

Warehouse Co., 93 U. S., 527, 548; Paddock v. Forrester, 3 M. & G., 903; 1 Elliott Ev., § 240.

[28] 1 Gr. Ev., § 192; Hartford Bridge Co. v. Granger, 4 Conn., 142, 148; Gerrish v. Sweetser, 4 Pick., 374, 377; Eastman v. Amoskeag Mfg. Co., 44 N. H., 143; 82 Am. D., 281; Brice v. Bauer, 108 N. Y., 428; 15 N. E. 695; 2 Am. St. R., 454.

[29] 1 Gr. Ev., § 193; Collet v. Keith, 4 Esp., 212; Newhall v. Jenkins, 2 Gray, 562; Wilson Sewing M. Co. v. Curry, 126 Ind., 161; 25 N. E. 896.

sions, as admissions are called in criminal cases, are admitted against the accused unless made voluntarily as hereinafter explained.

§ 25. Confessions not made voluntarily, excluded—What deemed involuntary.—No confession is considered voluntary if made under inducements of hope or fear held out to the accused by a person in authority, and having reference to the charge against the former, whether addressed directly to him or brought indirectly to his knowledge, *provided* that in the opinion of the judge such inducement gave the accused reasonable ground for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not considered involuntary because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. By a person in authority is meant any one having authority over the prosecution, or over the accused in connection with the prosecution, as the prosecutor, officers of justice having him in custody, magistrates, and others in similar positions ; but

the master or employer of the accused is not such a person in authority unless the offense charged was committed against him. The mere fact, however, that a confession was made after such inducements had been held out does not make it involuntary, if, in the opinion of the judge, the impression produced by such inducements had been completely removed before the confession was made, for in such cases these inducements could not properly be said to have caused the confession.[30]

§ 26. But a fact first discovered by means of an involuntary confession may be proved by other evidence.—When the knowledge of a fact is obtained by means of an involuntary confession of the accused, although the confession itself is inadmissible, it does not prevent the prosecutor from giving in evidence the fact itself, and that it was discovered through information derived from the accused. Thus where stolen property, or the instrument of a crime, or the body of a person murdered, has been discovered by means

[30] Ste. Dig., art. 22; 1 Gr. Ev., §§ 217-239; Tay. Ev., §§ 872-887; Com. v. Knapp, 10 Pick., 477, 489; 20 Am. D., 534, 298; Hopt v. Utah, 110 U. S., 574, 583; 1 Elliott Ev., §§ 278-286.

of information unduly obtained from the accused, it is competent to prove that he stated the thing would be found by searching a certain place, and that it was so found; but it would not be competent to inquire whether he confessed that he had put it there.[31]

§ 27. Sworn confessions made by an accused person while under examination before a magistrate, excluded as involuntary.—Sworn confessions made by a party when under examination before a magistrate, respecting a criminal offense with which he is charged at the time of the examination, are not under the common law received in evidence, upon the ground, according to Prof. Greenleaf, that "if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury and the dread of additional penalties, the confession can scarcely be regarded as voluntary."[32] It is somewhat difficult to perceive the force of this argument,

[31] Ste. Dig., art. 22; 1 Gr. Ev., §§ 231, 232; Tay. Ev., §§ 902, 903; R. v. Gould, 9 Car. & P., 364; Duffy v. People, 26 N. Y., 588; Daniels v. State, 78 Ga., 98; 6 Am. St. R., 238; Adams v. New York, 192 U. S., 585; 1 Elliott Ev., § 288.

[32] 1 Gr. Ev., § 225; State v. Clifford, 86 Iowa, 550; 53 N. W. 299; 41 Am. St. R., 518; People v. Mondon, 103 N. Y., 211; 8 N. E., 496; 57 Am. R., 709.

or to discover why a confession otherwise admissible in evidence must be conclusively presumed to have been involuntary, and therefore excluded, simply because it has been sworn to by the party making it; but such is the rule as now established by numerous decisions, both English and American. The rule is restricted, however, to the sworn statements made by a party who is himself held under the charge of a criminal offense at the time he makes them. Statements upon oath amounting to a confession, if made by the prisoner when examined as a witness in another proceeding, are admissible in evidence against him, unless he can prove that when questions tending to criminate him were put he had claimed the protection of the court and had still been illegally compelled to answer.[33]

§ 28. How far modified by statutes permitting accused to testify, quaere.—This rule, excluding statements made by the accused un-

[33] Ste. Dig., art. 23; 1 Gr. Ev., § 225; Tay. Ev., §§ 895-900; 1 Wigmore Ev., §§ 842, 852; note 1; R. v. Chidley & Cummins, 8 C. C. R., 365; Hendrickson v. People, 10 N. Y. (6 Sel.), 131; 61 Am. D., 721; People v. Mondon, 103 N. Y., 211; 8 N. E. 496; 57 Am. R., 709.

der oath in a criminal proceeding against himself, has been somewhat modified by the legislation now adopted in many of the United States, whereby persons accused of criminal offenses have been made competent witnesses in their own behalf. Whenever a prisoner voluntarily testifies as a witness on his own behalf under any of these statutes, either before a magistrate upon a preliminary examination, or in court, any statements made by him under oath may afterwards be offered in evidence against him in any subsequent trial, whether under the same or a different indictment.[34]

§ 29. Confessions made under promise of secrecy or obtained by deception, not involuntary.—As the only test of the admissibility of a confession is whether or not it was made voluntarily, it follows that it may not be excluded because made under a promise of secrecy,[35] or in consequence of a deception prac-

[34] Whar. Crim. Ev., §§ 463, 464, 669; People v. Kelly, 47 Cal., 125; State v. Glass, 50 Wis. 218; 6 N. W. 500; 36 Am. R., 845. But this rule is strictly limited to cases where the testimony admitted was given voluntarily in the first instance. See People v. Sharp, 107 N. Y., 427; 14 N. E. 319; 1 Am. St. R., 851.

[35] Ste. Dig., art. 24; Tay. Ev., § 881; R. v. Shaw,

ticed on the accused,[36] or while he was drunk,[37] or because it was made in answer to questions which he need not have answered, whatever may have been the form of them.[38] Although it is customary to warn a prisoner when he is about to make a confession, that he is not bound to do so, the omission of such warning does not thereby make his confession inadmissible.[39]

6 Car. & P., 372; Com. v. Knapp, 9 Pick., 496; 20 Am. D., 491; State v. Mitchell, 1 Phill. (N. C.) L., 447; State v. Darnall, 1 Houst. Cr. C., 321.

[36] Price v. State, 18 Ohio St., 418; Com. v. Hanlon, 3 Brewster, 461, 498; People v. Barker, 6 Mich., 277; 1 Am. St. R., 501; Heldt v. State, 20 Neb., 492; 30 N. W. 626; 57 Am. R., 835; State v. Phelps, 74 Mo., 128.

[37] Com. v. Howe, 9 Gray, 110; Eskridge v. State, 25 Ala., 30; Jefferds v. People, 5 Parker, C. R., 522, 561; State v. Grear, 28 Minn., 426; 10 N. W. 472; 41 Am. R., 296.

[38] R. v. Wild, 1 Moo. C. C., 452; Carroll v. State, 23 Ala., 28; 58 Am. D., 282.

[39] R. v. Thornton, 1 Moo. C. C., 27; R. v. Long, 6 Car. & P., 179; Com. v. Smith, 119 Mass., 305; Com. v. Mosler, 4 Pa. St., 264; People v. Rogers, 18 N. Y., 9, 14; 72 Am. D., 484; Hodge v. State, 97 Ala., 37; 12 So. 164; 38 Am. St. R., 146.

§ 30. Recitals of public facts in statutes or proclamations, and entries of facts made in official registers, admissible in evidence.—The second exception to the rule excluding hearsay, embraced within the class of cases (A) which is allowed upon the ground that in it the application of the three tests to the person making the original statement are superfluous, includes statements as to any act of state or other matter of a public nature contained in the recital of any public statute, or in any public proclamation, or any message of the executive to the legislature, or in any legislative resolutions, and statements as to the acts of any foreign governments and functionaries contained in state papers published by authority of congress, and in diplomatic correspondence communicated by the president to congress. All these are admissible evidence of the facts so stated, when such facts are in issue or relevant thereto.[40] So, also, the entries made in official registers, or books kept by persons in public office, are competent evidence to prove any relevant facts, which, having occurred in the presence

[40] 1 Gr. Ev., § 491; Watkins v. Holman, 16 Peters, 25, 55, 56; Radcliff v. United States, 7 Johnson, 38, 51; Tay. Ev., §§ 1660, 1661; 1 Ell. Ev., §§ 411, 412.

or within the personal knowledge of the registering officer, it was his duty to have recorded therein, and which he did so record within a short time after their occurrence.[41] To entitle a book to the character of an official register it need not be required by an express statute to be kept, nor need the nature of the office render it indispensable. It is sufficient that it be *directed by the proper authority to be kept,* and that it be kept according to such directions for the purpose of being referred to by the public.[42]

§ 31. Grounds of admissibility.—The ground upon which such extraordinary confidence is placed in documents of the above character, that the statements contained in them are accepted as evidence without being subjected to the three tests generally applied to other statements, is principally that of the publicity of their subject-matter, and of the further fact that they have been made in the course of duty by the authorized and accredited

[41] 1 Gr. Ev., §§ 483-5, 493-5; Tay. Ev., §§ 1591-1595; Ste. Dig., art. 34; Evanston v. Gunn, 99 U. S., 660, 666; Blackburn v. Crawford, 3 Wall., 175, 189, 191; 1 Elliott Ev., § 413.

[42] 1 Gr. Ev., § 496; Evanston v. Gunn, supra.

agents of the public appointed for that purpose.[43]

§ 32. Matters of general public history in accredited works by deceased or foreign authors—Almanacs—Maps.—Upon the same principle, statements as to matters of general public history, made in accredited historical works by authors deceased or out of reach of process of the court, have been permitted to be read in evidence to prove the facts so stated when relevant to the issue;[44] and in the case of *Regina* v. *Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. So, also, in a later case in Maryland,[45] it was held that an almanac was properly admitted in evidence to prove the hour at which the moon rose on a certain night. It may well be doubted, however, whether the true ground upon which the historical works and almanac above mentioned were permitted to be read in court was not

[43] 1 Gr. Ev., § 483; Evanston v. Gunn, 99 U. S., 660, 666.

[44] Ste. Dig., art. 35; 1 Gr. Ev., § 497; Morris v. Harmer, 7 Peters, 554; Whiton v. Albany City Ins. Co., 109 Mass., 24; 1 Elliott Ev., § 417.

[45] Munshower v. State, 55 Md., 11.

that the facts sought to be established by them were facts of which it was the duty of the court to take judicial notice without formal proof, when called upon to do so, upon being satisfied as to their truth, and that the books were therefore introduced not technically as evidence, but for the purpose of satisfying the judge that the facts sought to be established were proper matters to be taken notice of judicially. The maps used in the case of *Regina* v. *Orton* may either have been admitted upon the same ground, or may have been introduced for the purpose of illustrating and showing the relation of facts which the court took judicial notice of, or which were admitted, or had been proved by witnesses. Relevant facts contained in books of exact science or mathematics as the Northampton tables of Mortality may be read in evidence,[46] but not statements in books of inductive science, as medical works, which are not held competent evidence for any purpose except perhaps to contradict expert witnesses who have quoted them as sustaining their own opinions.[47]

[46] Vicksburg R. R. Co. v. Putnam, 118 U. S., 545, 554; Damm v. Damm, 109 Mich., 619, 632; 67 N. W. 984; 63 Am. St. R., 601.

[47] Tucker v. Donald, 60 Miss., 460, 470; 45 Am. R.,

§ 33. Entries in books of corporation admissible in certain cases.— When the entries made in the books of a corporation relate to acts of a public character, and have been made by the proper officer, they are receivable in evidence, either for or against the corporation, for the purpose of proving its organization and existence and the regularity and legality of its corporate proceedings, such books being regarded in the light of *quasi* official registers for the purpose of recording such proceedings; but when such entries relate to the private transactions of the company, they will be inadmissable, except, perhaps, in actions between its own members,[48] and in actions against the corporation by a creditor in which they are considered as *primâ facie* admissions of fact made on be-

416; Ashworth v. Kittredge, 12 Cush., 193; 59 Am. Dec., 178, note; Boyle v. State, 57 Wis., 472; 46 Am. R., 41; City of Bloomington v. Shrock, 110 Ill., 219; 51 Am. R., 678; Union Pacific R. R. Co. v. Yates, 49 U. S. App., 241; 79 Fed. R., 584; 40 L. R. A., 553, note; Rogers on Expert Testimony, §§ 164-184.

[48] Tay. Ev., § 1781; Cook on Stock & Corp., § 714; Owings v. Speed, 5 Wheat., 420; Argus Co. v. Albany, 55 N. Y., 495; 14 Am. R. 296; Duke v. Cahawba Nav. Co., 10 Ala., 82; 44 Am. D., 472. How proved, see First Nat. Bank v. Tesdale, 84 N. Y., 665

half of the corporation by its agents in the course of their employment, with the same effect as like admissions made by the agents of individuals under similar circumstances.[48a]

§ 34. Records of judicial proceedings conclusive proof of the substantive facts recited. —The third exception to the rule excluding hearsay relates to the records of judicial proceedings, which, because the law always presumes that every court keeps a faithful record of its own proceedings, are not only competent but conclusive evidence to prove that the proceedings therein recorded actually took place as therein recited, and that judgment was actually rendered as therein set forth.[49] Without such conclusive presumption of the correctness of judicial records, no judgment could ever be practically enforced, for it would always be in the power of any party interested to dispute its existence at any time, and this would involve a new inves-

[48a] City Electric Ry. Co. v. First Nat. Bank, 62 Ark., 32; 34 S. W. 89; 54 Am. St. R., 282, 287; Zang v. Wyant, 25 Colo., 351, 362; 56 P., 565; 71 Am. St. R., 145, 154; 2 Whar. Ev., § 1131; 2 Wigmore Ev., § 1557 (2).

[49] Ste. Dig., art. 40; 1 Gr. Ev., § 538; Tay. Ev., § 1667; 2 Elliott Ev., § 1525.

tigation and a new trial which would be no more conclusive than the first. Of course it would be absurd to apply any tests to that which the law conclusively assumes to be correct. As the record is conclusive evidence of the rendition of the judgment, it follows as a natural consequence that it is also conclusive evidence of the existence of that result or state of things which the judgment necessarily effects.[50] Thus the record of a suit wherein the plaintiff recovered judgment for $10,000 damages is conclusive proof that upon the rendition thereof the defendant was debtor to the plaintiff in that amount; the record of a proceeding resulting in a decree of divorce *a vinculo matrimonii* is conclusive proof that the complainant and defendant are no longer husband and wife, and the record of a proceeding in bankruptcy is conclusive proof that the person therein stated to have been adjudicated a bankrupt is a bankrupt.

§ 35. But not of the correctness of the decision rendered, except in certain cases.—But although the record is always conclusive proof of the rendition of the judgment therein

[50] Ibid; King v. Chase, 15 N. H., 9; 14 Am. D., 675; Key v. Dent, 14 Md., 86, 98; Barr v. Gratz, 4 Wheat., 213, 220; Ennis v. Smith, 14 How., 400, 430.

recited, and of the result accomplished by it, it by no means follows that it is in all cases equally conclusive or even competent evidence to establish the correctness of the verdict of the jury, or the finding of matters of fact by the court upon which such judgment was predicated ; for as it often happens that a tribunal, either from not having sufficient evidence before it, or from other causes, may have arrived at a wrong decision as to the truth of the matters of fact submitted to it, such verdict can never amount to more than mere presumptive evidence of the truth of such matters. Thus in the examples given in the preceding section, the record mentioned would not furnish conclusive proof that the defendant had actually committed the tort for which judgment was rendered against him in the first case, or that the defendant in the second had been guilty of the misconduct which was the ground on which the divorce was granted, or that the party adjudicated a bankrupt in the third case had actually done anything to bring him within the provisions of the law ; for in each instance it is possible that the jury or judge may have been induced by false or imperfect testimony to have rendered a decision at variance with the true facts of the case. Thus

it will be seen that every record of a court of justice consists of two distinct parts, which have been respectively denominated by Mr. Best [51] the *substantive* and *judicial* portions. In the former the court records or attests its own proceedings and acts, and to this unerring verity is attributed by the law; while the latter or *judicial* portion, by which the court expresses its judgment or opinion on the matter before it, is only conclusive, or indeed competent, as evidence, under certain circumstances which we shall now consider.

§ 36. Rules regulating the admissibility and conclusiveness of the judicial portions of records:

(a) Admissible and conclusive as between the parties and their privies;

(b) Inadmissible in all other cases, except

1st, That judgments declaratory of the status of a person or thing are admissible and generally conclusive proof of such status; and

2nd, That adjudications upon questions involving custom and pedigree are admissible in certain cases as between others than parties or privies.—

The question as to how far this judicial

[51] Best on Ev., § 590.

portion of a record is properly admissible as evidence of the matters of fact which it determines, is made dependent upon several considerations. While, upon the one hand, public policy requires that some limit should be opposed to the continuance of litigation upon the same subject-matter, after it has once been decided by a competent tribunal, it is, on the other hand, an elementary rule and principle of justice, that no man should be bound by an act or admission of another to which he is a stranger. Consequently no one ought to be concluded or affected, as to a matter of private right, by a judgment or verdict to which neither he nor any one through whom he claims was a party, to which no defense could have been made, and from which no appeal could have been taken on his behalf; which may have resulted from the negligence of another, or may even have been obtained by means of fraud and collusion. Neither would it be fair that a party should be concluded by an adverse verdict under circumstances in which he could not have availed himself of it as a protection, if it had been rendered in his favor. So, also, it would be unjust that the rights of a plaintiff or defendant should be determined by the result of a

former proceeding even between the same parties, in cases where, from the nature of the former proceeding, he was not entitled to support his case by the same evidence which he might have availed himself of in the second suit, for he would thus be virtually deprived in the second suit of evidence to the benefit of which he is by law entitled. Therefore the following rules have been adopted in regard to the admissibility and conclusiveness of the *judicial* portions of records:

(a) Every judgment rendered by a court having competent jurisdiction over the parties and the subject-matter is, as between the parties thereto and their privies (*i. e.*, persons claiming through or under parties by title derived subsequently to the rendition of the judgment), conclusive proof of all facts actually decided by the court, and appearing from the record itself to be the ground on which the judgment was based, unless evidence was admitted in the action in which judgment was delivered, which is excluded in the action in which that judgment is intended to be proved, or *vice versâ*.[52]

[52] Ste. Dig., art. 41; 1 Gr. Ev., §§ 522, 523, 524; Tay. Ev., §§ 1682-1723; Starkie Ev., pp. *323, etc.; Beloit v. Morgan, 7 Wall., 619, 622; Lawrence v.

(b) No record of any judgment is admissible in evidence to prove or render probable the existence of any matter of fact therein stated to have been decided, or which might be inferred from the rendition of such judgment, otherwise than as stated in the preceding rule, except that: 1. The records of all judgments rendered by courts of competent jurisdiction which are declaratory of the status of a person or thing, are always relevant to establish the existence of such status as declared therein; all such records, when admissible, are conclusive, excepting those of inquisitions of lunacy and inquests of office, which for certain purposes and as against certain persons are *primâ facie* evidence only.[53] 2. In all cases where general reputation is competent evidence, such as those involving questions of custom, prescription and

Vernon, 3 Sum., 20; 15 Fed. Cas., 84; Case v. Reeve, 14 Johns. 81; Embury v. Conner, 3 N. Y., 511; 53 Am. R., 523; Cromwell v. County of Sac, 94 U. S., 351; 2 Elliott Ev., § 1529.

[53] 1 Gr. Ev., §§ 525, 550, 556; Starkie Ev., pp. *371-382; Tay. Ev., § 1674; Burlen v. Shannon, 3 Gray, 387, 389; Ennis v. Smith, 14 How., 400, 430; Mut. Life Ins. Co. v. Tisdale, 91 U. S., 238, 241; Packham v. Glendemeyer, 103 Md., 416, 423, 63, A 1048; 2 Elliott Ev., §§ 1530-1532.

pedigree, the records of adjudications relating thereto are admissible in evidence, not only as between parties and privies (where they would be conclusive), but also as between all others, as being of the same nature, but much stronger than mere reputation.[54]

§ 37. Why judgments declaratory of the status of a person or thing are always admissible to prove it.—The reasons for the exceptions by which the records of judgments declaratory of the status of persons or things are admissible, and in most cases conclusive evidence to prove such status as against those not parties thereto, are that as regards those cases declaratory of the status of persons, it is upon grounds of public policy deemed essential that the legal social relations of every member of the community should not be left doubtful, but, having been clearly defined by one solemn adjudication, should thereafter be conclusively set at rest; and as regards those cases declaratory of the status of things, and especially in questions as to property seized and proceeded against, because generally every one who can possibly be af-

[54] 1 Gr. Ev., § 526; Tay. Ev., § 1683; Starkie Ev., p. *386; Patterson v. Gaines, 6 How., 550, 599; Maybee v. Avery, 18 Johns., 352.

fected by the decision has a right to appear and assert his own rights, by becoming an actual party to the proceedings.[55] Such judgments are known as judgments *in rem*.

§ 38. **Who are parties to a judgment.**—The term parties to a judgment, as used in this connection, is in the United States generally understood to include all persons who are directly interested in the subject-matter, and have a right to control the proceedings and to appeal from the decision; as for example, a plaintiff in attachment who has given an indemnity bond to the sheriff for levying upon certain property, and who would in this sense be considered a party to any action of trespass brought against the latter for making such levy.[56] But although one or two of the English cases appear to favor this liberal construction of the rule, there is no direct authority in the courts of that country for extending it beyond those who are named in the record.[57] The parties to the record

[55] 1 Gr. Ev., § 525; Tay. Ev., § 1676.

[56] 1 Gr. Ev., §§ 523; Lovejoy v. Murray, 3 Wall., 18; Robbins v. Chicago, etc., 4 Wall., 657, 672; Stovall v. Banks, 10 Wall., 583, 588.

[57] Tay. Ev., §§ 1687, 1688.

of a criminal proceeding, being the state and the accused, it follows from the preceding rules that such a record, while admissible in civil causes to prove the fact of the acquittal or conviction of the prisoner, is not relevant to show that he did or did not commit the act for which he was indicted.[58]

§ 39. Admissibility of record dependent upon whether court had jurisdiction, which may always be inquired into.—As already stated, the admissibility in evidence of every record is conditional upon the fact of the court which rendered the judgment having had competent jurisdiction over the parties and the subject-matter; and although such judgments are, when admissible, generally speaking, conclusive of the matters decided by them, the question as to whether the courts which rendered them had competent jurisdiction, is one which may always be inquired into; and it is also open to the party against whom such a record is offered in evidence, to show that the judgment had been reversed on appeal, or (if he be not a party or privy) he may show that it was obtained by fraud or collusion, provided that neither he,

[58] 1 Gr. Ev., § 537.

nor any person to whom he is privy, was a party thereto.[59]

§ 40. Same doctrine applicable to foreign as well as domestic judgments.—The foregoing remarks apply to the records of all judgments rendered by courts of the same state and of the United States, and also to those rendered by the courts of sister states of the Union, under the provision of the constitution of the United States, requiring full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state, and the laws of congress thereunder.[60] They may also be said to be equally applicable, practically, to records of foreign courts; for, although the American courts have until recently maintained the general doctrine that foreign judgments, when relevant, are *primâ facie* evidence only, and impeachable, no modern case can be found in which such a judgment has been per-

[59] Ste. Dig., art. 46; 1 Whar. Ev., § 795, etc.; Thompson v. Whitman, 18 Wall., 457; Christmas v. Russell, 5 id., 290, 304; Ferguson v. Crawford, 70 N. Y., 253; 26 Am. R., 589. As to fraud, see Atlas Nat. Bank v. More, 152 Ill., 528, 42; 38 N. E. 684; 43 Am. St. R., 274, 284; also 1 Whar. Ev., § 797.

[60] Const. U. S., art. 4, § 1; Rev. Stat. U. S., § 905, etc.; Christmas v. Russell, supra.

mitted to be impeached, except for want of jurisdiction or fraud; and some recent decisions have expressly held that they can be impeached upon no other grounds, and are conclusive upon the merits.[61]

§ 41. General reputation sometimes admissible in evidence.—The fourth exception to the rule excluding hearsay evidence comprises those statements made by third parties out of court, by means of which a witness has become aware of the existence of any general reputation, the existence of which is relevant to the issue. As general reputation is merely the general opinion or conclusion concerning a particular matter which has been arrived at by society at large, or some indefinite part of it, through the combined knowledge and experience of its individual members. it becomes superfluous to apply the three ordinary tests of truth to the statements offered in evidence merely as the expresions of such general opinion, since, in this case, the re-

[61] Ste. Dig., art. 47; Story, Confl. Laws, § 608; 2 Whar. Ev., §§ 801-803; Hilton v. Guyot, 159 U. S., 113, 162; Lazier v. Westcott, 26 N. Y., 146, 150; 82 Am. D., 404; Dunlap v. Cody, 31 Iowa, 260; 7 Am. R., 129; Dunstan v. Higgins, 138 N. Y., 70; 33 N. E., 729; 34 Am. St. R., 431; 20 L. R. A., 668.

liance is not placed upon the credit due to the assertions of any single individual, but rests upon the fact that indefinite numbers concur in expressing the same belief. Hence the true subject of inquiry is, not whether the several statements giving expression to this belief are strictly true and accurate as a matter of fact, but rather, whether or not they were very generally made by persons of that class best situated for obtaining information upon the subject. Besides those cases in which the existence of a general reputation as to certain matters becomes sometimes relevant, as affording a probable cause for or explanation of some act, there are others involving a class of facts which, being ordinarily imperceptible to the senses, and therefore incapable of proof by the usual methods, must be established, if at all, by general reputation, that being the best means of proof which the nature of the case affords. Such facts are character, pedigree or relationship, solvency or wealth, prescription, custom, boundaries, and the like, the nature or existence of which can frequently be proved only by general repute among the particular class of persons most favorably situated for acquiring information in regard to them. Thus, a man's character is shown by his gen-

eral repute among those who are acquainted with him; his relationship to any family by general repute among the members of that family; and questions of prescription, custom and boundaries, in so far as they are matters of general interest to any considerable portion of the community, may be proved by the general reputation prevailing among the class so interested in them.[62] So, also, where it is a question whether two persons are husband and wife, the facts that they cohabited together, and were generally reputed to be such among their acquaintances, are relevant as competent evidence from which a valid marriage between them may be inferred, excepting in criminal prosecutions for bigamy and adultery, and civil suits for damages for the seduction of a spouse.[63] These excep-

[62] Starkie Ev., pp. *43-47; 1 Gr. Ev., § 101; Tay. Ev., §§ 577-599; 2 Wigmore Ev., §§ 1610, et seq.

[63] 1 Gr. Ev., § 107; 2 id., § 462; Tay. Ev., § 578; Ste. Dig., art. 53. In England, and also in some jurisdictions in this country, an additional exception is made to the competency of such evidence to prove marriage in the case of proceedings for divorce, but there is great diversity in the practice prevailing upon this point in different states. See 2 Bishop Mar. & Div., §§ 266-276; Jewell v. Jewell, 1 How., 209, 232; Blackburn v. Crawford, 3 Wall., 175, 191; Jones v.

tions rest on the ground that such proceedings, being of a penal nature, require the strictest proof, since the accused has the presumption of innocence in his favor, which is sufficient alone to overcome the presumption of marriage; and a further reason for the exception in civil actions for the seduction of an alleged husband or wife seems to be, to prevent parties from setting up pretended marriages for evil purposes.[64]

§ 42. (B.) Second class of exceptions to rule excluding hearsay—Statements made under certain circumstances by persons since deceased, insane or permanently beyond the reach of process.—We now come to the second class of exceptions to the rule excluding hearsay, being certain declarations or statements to which some one or more of the three tests cannot be applied by reason of the death, insanity or permanent absence from the state of the person who made them, but which were made under conditions which the law regards as furnishing a sufficient guarantee of their truth to justify their reception as evidence

Jones, 48 Md., 391, 397; 30 Am. R., 466; Badger v. Badger, 88 N. Y., 546; 42 Am. R., 263.

[64] Best on Ev., § 349; Tay. Ev., § 172.

without being subjected to such tests. These declarations are:

§ 43. (1) Evidence given in former proceeding, or at earlier stage of same action.— Testimony given at an earlier stage of the same action, or in a previous one, between the same parties or their representatives in interest, and involving substantially the same question, by witnesses since deceased or insane, is always admissible in evidence; *provided* the person against whom it is given, or some one through whom he claims, had the right and opportunity to cross-examine the declarant when he was examined as a witness.[65] Such statements, if correctly reported, would be entitled to almost the same consideration as if made in open court, for they would have been subjected to all the tests which could be applied in the latter case, excepting that the demeanor of the witness could not be seen and commented upon; but as this is the least important of the three tests, it is found that much less injustice is

[65] Ste. Dig., art. 32. When witness dead. Mattox v. United States, 156 U. S., 237, 240; Mineral Point R. R. Co. v. Keep, 22 Ill., 9; 74 Am. D., 124. When insane. Emig v. Diehl, 76 Pa. St., 373; Drayton v. Wells, 1 Nott & McC., 409; 9 Am. D., 718.

done by waiving it, in cases where it is impracticable to apply it, than would result from such a rigid enforcement of the rule requiring it as would oftentimes exclude important testimony which could not be supplied from any other source.[66] Courts are therefore disposed to put a liberal construction upon this exception and to admit testimony of this kind whenever it appears that the party offering it has used all reasonable efforts to secure the personal attendance of the witness, and has been unable to do so:[67] as for example, it has been extended to include cases where the witness was so ill that he would probably never be able to travel;[68] where he was kept out of the way by the adverse party,[69] and some cases where he could not be found.[70] Such testimony may be

[66] Best on Ev., § 496; 1 Elliott Ev., § 496, § 320.

[67] Ste. Dig., art. 32; Tay. Ev., §§ 464-477; 1 Gr. Ev., §§ 163-166.

[68] Miller v. Russell, 7 Martin, 266 (N. S.); Emig v. Diehl, 76 Pa. St., 373.

[69] Williams v. State, 19 Ga., 402; Reynolds v. United States, 98 U. S., 145, 158.

[70] R. v. Scaife, 17 Q. B., 238; Wilbur v. Selden, 6 Cow., 162; State v. Staples, 47 N. H., 113. Also, in civil cases, where out of the jurisdiction. Noble v. McClintock, 6 W. & S., 58, 61; Mims v. Sturtevant,

proved by any witness who was present and heard it given even though an official stenographer had taken it down at the time.[71]

§ 44. (2) **Dying declarations.**—Declarations made by a person under a full apprehension of impending death, and after having given up all hope of recovery, are admitted in evidence in trials for the homicide of the declarant, to prove the cause of his death, or any of the circumstances of the transaction which resulted in it. This exception is made because it is considered that, under such solemn circumstances, the declarant could have no adequate temptation to falsehood; and inasmuch as ordinarily third persons are not present as eye-witnesses to a murder, it would often happen that unless such dying declarations were received, the murderer might escape justice.[72]

§ 45. **(3) Declarations made in the ordinary course of business.**—Declarations by

36 Ala., 63. But authorities are conflicting on this point. See note 65 Am. D., p. 676.

[71] Studebaker v. Taylor, 170 Ind., 498, 509; 83 N. E., 747; 127 Am. St. R., 397, 406.

[72] Ste. Dig., 26; 1 Gr. Ev., §§ 156-162; Tay. Ev., §§ 714-722; Best Ev., § 505; 1 Elliott Ev., § 334.

persons having no interest in stating an untruth, made in the ordinary course of their business or in the discharge of professional duty, and from their own personal knowledge, at or near the time when the matter stated occurred, are admitted to prove any facts necessary to the performance of a duty by the declarant. This exception is made upon the ground that, in the absence of all suspicion of sinister motives, a strong presumption arises that statements made in the ordinary routine of business are correct; and more especially is this the case when, as is most usual, such declarations have been made in the form of written entries in some book or record kept by the declarant for his own private use, or that of an employer, and which it would therefore be plainly for his own advantage for him to keep accurately. Unless statements of this kind were received in evidence, it would be next to impossible to prove ordinary store accounts for goods sold and delivered, in cases where the persons who had delivered and charged them had since died.[73] This rule

[73] Ste. Dig., art. 27; Tay. Ev., §§ 696-713; 1 Gr. Ev., §§ 115-119; Price v. Torrington, 1 Sm. Lead. Cas. (7th Am. ed.), *394; Nicholls v. Webb, 8 Wheat., 326, 334; Barber v. Bennett, 58 Vt., 476; 56 Am. R.,

has been extended in some of the United States to apply to entries made by the party himself in his own shop books. The extent to which such entries are admitted in evidence is regulated by local practice, which varies greatly in the different states, many of which still adhere to the common-law rule as above given, restricting the admissibility of declarations made in the course of business to those of declarants who had no interest to falsify.[74]

565. But see Tome Inst. v. Davis, 87 Md., 591; 41 A., 496; 14 L. N. S., 292.

[74] A full statement of the law upon this subject will be found in the note of the American editors to the case of Price v. Earl of Torrington, 1 Sm. Lead. Cas. (7th Am. ed.), p. *407. Previous to the adoption of the statutes rendering parties competent witnesses in their own behalf, it was held in the states of Massachusetts, New Hampshire, Maine, Pennsylvania, South Caroline, Connecticut and Delaware, that entries made by a party in his own books were admissible in evidence as relevant facts, in proof of work done and goods delivered by said party, when it appeared to the judge from inspection of said books that they were a register of the daily business of the party, honestly and fairly kept, without erasures in a material part, save such as were satisfactorily explained, and where the party himself made oath in open court

§ 46. **(4) Declarations made against the interest of the declarant.**—Declarations made by a person who had peculiar means of knowing the matter stated, and who had no interest to misrepresent it, are admitted in evidence when shown to have been opposed to

that they were the books in which the accounts of his ordinary business transactions were usually kept; that the articles therein charged were actually delivered, and the labor and services therein charged were actually performed; that the entries were made at or about the time of the transactions, and were the original entries thereof, and that the sums charged and claimed had not been paid. The same rule prevailed also in the states of New York, Illinois, New Jersey, Georgia and Ohio, except that in these latter the suppletory oath of the party himself was neither required nor admitted. In the states of Maryland, North Carolina, Tennessee, Alabama and Vermont, the entries of a party in his own books are not admissible in evidence, except where supported by his own oath, and then only for small amounts regulated by statute. In Indiana, Mississippi, Virginia and Kentucky, the common-law rule prevails. Of course the statutes making parties competent witnesses enable them to use their books to refresh their memory in testifying. In all cases where the entries made in his own books by a person, who has since died or become insane, would have been evidence in his own behalf, if sup-

the pecuniary or proprietary interest of the declarant.[74a] The ground of this exception is the extreme improbability of falsehood in declarations made under such circumstances; for as men usually have such regard for their own interests as not to make any statements prejudicial to them about matters within their own knowledge, unless they are true, the

plemented by his oath, as above stated, they may also be offered in evidence in actions brought by his executor, administrator or guardian, for work done or goods delivered by said deceased or insane person, upon such executor, administrator or guardian making oath that such books came to his hands as the genuine and only books of account of said deceased or insane person, and that to the best of his knowledge and belief the entries are original and contemporaneous with the fact, and the debt unpaid, and also furnishing proof that such entries are in the handwriting of said deceased or insane person. A full collection of decisions relative to the admissibility in evidence of books, reports and memoranda made or authorized by the party seeking to introduce them, will be found in the note on page 891 of Vol. 127, Am. State Reports under the case of Eureka Mining Co. v. Bullion Mining Co., 32 Utah, 736 there reported.

[74a] Ste. Dig., art. 28; 1 Gr. Ev., §§ 147-155; Tay. Ev., §§ 668-698; Higham v. Ridgway, 2 Sm. Lead. Cas., 7 Am. Ed., p. *330; 1 Elliott Ev., §§ 434-453.

fact that such statements are not admitted in evidence until after the death of the declarant is considered a sufficient guarantee that they were not made for any fraudulent purpose. There is this difference between the declarations admitted under this exception, and those admitted upon the ground of having been made in the ordinary course of business: that while the latter, as we have seen, are admissible only to prove facts which were necessary to the performance of some duty by the declarant, declarations against the interest of the declarant are received in evidence of all matters that form part of such declarations, although some of them were not, in themselves, against his interest. Thus, where A., B. and C. had made a joint and several promissory note for £300, and a partial payment had been made by A., which was indorsed by the payee upon the note in these terms: "Received of A. the sum of £280, on account of the within note, *the* £300 *having been originally advanced to C.,*" the court held, in an action brought by A. to recover contribution from B. as a co-surety, that, the payee being dead, his indorsement was admissible to prove the whole statement contained in it, and was therefore evidence not only of the payment

of A., but also of the fact that C. was the principal debtor.[75] But statements as to entirely independent matters are not evidence simply because made at the same time and place with a declaration against interest, unless connected with it by being referred to in it, or by being necessary to explain it; thus, in an account rendered by a steward, since deceased, containing on one side entries charging himself with the receipt of moneys, and on the other side items discharging him, by showing how the moneys received had been disbursed, the discharging entries will not be admissible in evidence, unless they are necessary to explain the charging entries, or are expressly referred to by them.[76] The term "declaration," as applied to this exception, embraces all statements, verbal or written, whether made at the time of the fact declared, or on a subsequent day, provided that they were against the pecuniary or proprietary interest of the declarant at the time when made;[77] hence the indorsement of a partial payment upon an instrument barred by the statute of limitations does not come within

[75] Davies v. Humphreys, 6 M. & W., 153, 166.

[76] Doe v. Beviss, 7 C. B., 456.

[77] Tay. Ev., § 673.

the rule, unless shown to have been made before the statutory period had elapsed, since the receipt of money by the payee after that time would then operate in favor of his proprietary interest by removing the bar of the statute which had already attached.[78] This exception is most frequently exemplified by entries in books of account, which either charge the party making them with the receipt of money on account of a third person, or acknowledge the payment of money due to himself; and the weight of authority now seems to support the proposition that entries of the latter class are admissible, even in cases where they are the only evidence of the charge of which they show the subsequent liquidation.[79]

§ 47. (5) Declarations of testator as to contents of his will.—Declarations made by a testator as to the contents of his will have been held in the event of the loss of such will, admissible in evidence to prove its contents.

[78] Id., §§ 693-696; 1 Gr. Ev., §§ 121, 122; Allegheny Co. v. Nelson, 25 Pa. St., 332, 334; Roseboom v. Billington, 17 Johns., 182; Burgoon v. Bixler, 55 Md., 384, 392; 39 Am. R., 418.

[79] 1 Gr. Ev., § 151; Tay. Ev., §§ 675, 676; Taylor v. Witham, L. R., 3 Ch. Div., 605.

This exception, like the preceding one, seems to have been allowed upon the ground of the extreme improbability of falsehood; since the testator, having an absolute right to change his will as often as he pleased during his life-time, could hardly be supposed to have any object in stating its contents to be other than they actually were.[80]

§ 48. (6) Declarations as to any public or general right or custom.—Declarations as to the existence of any public or general right or custom, or matter of public or general interest, made by persons who are shown to the satisfaction of the judge, or appear from the circumstances of their statements, to have had competent means of knowledge, are admissible to prove the existence of such right, custom or matter, *provided* they were made before any controversy arose touching the

[80] Ste. Dig., art. 29; 1 Whar. Ev., § 139; Sugden v. St. Leonards, L. R., 1 P. D. (C. A.), 154; Schouler on Wills, § 403; Matter of Page, 118 Ill., 576; 8 N. E., 852; 59 Am. R., 395, and note; Foster's Appeal, 87 Pa. St., 67; 30 Am. R., 340; Pickens v. Davis, 134 Mass., 252; 45 Am. R., 322; *contra,* Throckmorton v. Holt, 180 U. S., 552, 576, and see 3 Wigmore Ev., § 1736; but see 1 Elliott Ev., § 533.

matter to which they relate.[81] This exception is allowed upon the ground of necessity, for without it there would ordinarily be no method whatever of proving the existence of any such public or general right or custom (such as a highway or right of ferry, for example), at a period anterior to the memory of living witnesses. The restriction that the declarations must have been made before any controversy arose upon the subject, is imposed for the reason that such declarations are only admitted at all upon the ground that they are the natural effusions of a party who is presumed to know the truth, and to speak it, upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on one side or the other, and, even when disposed to speak the truth, they are very apt to see facts through a distorting medium.[82] If the right, custom or matter to be proved

[81] Ste. Dig., art. 30; 1 Gr. Ev., §§ 127-140; Tay. Ev., §§ 607, 634; 1 Elliott Ev., § 385.

[82] 1 Gr. Ev., § 131; 1 Whar. Ev., § 185; Ellicott v. Pearl, 10 Pet., 412; 1 Elliott Ev., § 386.

be public, *i. e.*, one which concerns every member of the state, every person is presumed to have had some knowledge as to whether it existed during his own life-time; but if it be only general, *i. e.*, one in which only a portion or class of the community are interested, such knowledge will not be presumed unless the declarant is shown to have belonged to the portion or class of the community so interested.[83]

§ 49. **(7) Declarations as to matters of pedigree.**—Declarations relating to matters of pedigree, which term embraces not only general questions of descent and relationship, but also such particular facts of family history as births, marriages and deaths, the circumstances immediately connected with their occurrence, the times, either definite or relative, at which they happened, legitimacy and the contrary, are admitted in evidence to prove such matters, when such declarations were made before the question in relation to which they are proved had arisen, and by a declarant shown either to have been himself legitimately related by blood, or to have been

[83] Declarations as to ancient boundary lines, held to come within this class in Maryland; Cadwallader v. Price, 111 Md., 310, 315; 75 A., 273.

married to some one so related to the person referred to by them. This exception, like the preceding one, has been recognized upon the ground of necessity, since tradition is often the sole method by which proof of matters of pedigree can be obtained, while the limitations to which it is subjected give an excellent illustration of the third great distinguishing principle of the Englsh law of evidence (the other two being the exclusion of *res inter alios* and of hearsay), that all facts must be proved, if at all, by the best kind of evidence of which they are susceptible. As the members of a family are always those most likely to be best acquainted with the nature of the ties of relationship by which they are united to each other, and to have the fullest information in regard to such matters of family history, the declarations admitted for the purpose of establishing such facts are restricted to the statements of blood relations, or persons who have become members of the family by marriage with one so related to it.[84] Upon the same principle, such declarations, to be competent evidence, must have

[84] Ste. Dig., art. 31; 1 Gr. Ev., §§ 103-106; Abb. Tr. Ev., Ch. V., 34-42; Tay. Ev., §§ 635, 657; Stein v. Bowman, 13 Pet., 220; Ellicott v. Pearl, 10 Pet.,

been made either from the personal knowledge of the declarant, or from information derived through other persons whose declarations would, on acount of the relationship in which they stood towards the family, be equally admissible with his own.[85] In this case also, as with declarations offered under the last preceding exception, relating to matters of public or general interest, and for the same reason, the declarations offered in evidence must be shown to have been made before any controversy had actually arisen over the matter to which they relate.[86] All declarations made after the controversy began are rigidly excluded, even though the declarant did not know of such controversy at the time he made them; but the fact that they may have been made for the purpose of preventing

412, 434; Jones v. Jones, 36 Md., 447; 11 Am. R., 505; Jewell v. Jewell, 1 How., 219, 231.

[85] Davies v. Lowndes, 6 M. & G., 527; Elliott v. Piersoll, 1 Pet., 328, 337; Secrist v. Green, 3 Wall., 744; Gaines v. New Orleans, 6 Wall., 642, 699; Craufurd v. Blackburn, 17 Md., 49, 54; 77 Am. D., 323.

[86] Berkley Peerage Case, 4 Camp., 401-407; Stein v. Bowman, 13 Pet., 209, 220; Ellicott v. Pearl, 10 Pet., 412, 434; Craufurd v. Blackburn, 17 Md., 49, 54; 77 Am. D., 323.

such controversy from arising does not render them inadmissible. Such declarations may be either verbal or written, and when made in the form of entries in a Bible or Testament, shown to have been the family Bible or Testament, they are admitted without proof that they were made by a relative; for as this book is the ordinary register of families, and usually accessible to all its members, the presumption is that the whole family have more or less adopted the entries contained in it. So, also, an inscription on a tombstone is admitted without proof that it was made by the direction of a relative, it being presumed that the family would not permit an erroneous inscription to remain. But no other entries or inscriptions are admitted in evidence without some proof of their having been made by or under direction of some deceased member of the family, or else of their having been so preserved and treated in the family as to give it the character of a declaration by the family or some of its members.[87]

[87] Abb. Tr. Ev., Ch. V, 36; Tay Ev., § 652; Chapman v. Chapman, 2 Conn., 347; 7 Am. D., 297; Lewis v. Marshall, 5 Pet., 470, 476; N. Brookfield v. Warren, 16 Gray, 174; as to proof of age, Grand Lodge v. Bartes, 69 Neb., 601; 98 N. W., 715; 111 Am. St. R., 577, note.

§ 50. Opinion excluded except in a few cases.—Similar to the rule excluding hearsay is that which declares that the fact of any person being of opinion that any fact in issue, or relevant thereto, does or does not exist, is irrelevant to prove its existence or the contrary, excepting in a few cases which will be considered presently. The theory of this rule is, that so far as such an opinion may be founded on no evidence at all, or on illegal evidence, no weight could be given to it whatever, without practically nullifying the rules of law excluding irrelevant matters and derivative evidence, and that so far as it may be founded on legal evidence, it is inferior in character to the original evidence upon which it is founded, which should itself be laid before the jury (or court, as the case may be), whom the law presumes to be, under ordinary circumstances at least, equally capable with the witnesses of drawing from it any inferences that justice may require.[88] The exceptions to this rule will be found to consist of those few cases where the law does not presume the jury or court to be equally capable with the witness of drawing correct

[88] Best Ev., § 511; 1 Elliott Ev., 672.

inferences from the facts upon which his opinion is founded.[89]

§ 51. Opinions formed from personal observation admissible when the best evidence that the nature of the case admits of.—The first exception embraces all those cases in which the opinion of the witness has been formed by personal observation of facts or phenomena so numerous or so evanescent that they cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to them, and as to which, therefore, no better evidence than such an opinion can be obtained.[90] Hence witnesses have been allowed to testify as to their opinion, upon questions of personal identity; as to whether two persons were attached to each other; as to whether a person was intoxicated; as to whether a person was of a certain age; as to

[89] Best Ev., § 513; 1 Elliott Ev., 675.

[90] Best Ev., § 517; 1 Whar. Ev., §§ 509-513; 1 Elliott Ev., § 675; Hardy v. Merrill, 56 N. H., 227, 241; 22 Am. R., 441; Sydleman v. Beckwith, 43 Conn., 9, 11; De Witt v. Barley, 17 N. Y., 340; Com. v. Sturtevant, 117 Mass., 122, 133; 19 Am. R., 401; Hopt v. Utah, 120 U. S., 430, 437; Ryder v. State, 100 Ga., 528; 28 S. E., 246; 38 L. R. A., 721, note.

whether a person was sane or insane, and many other questions of a similar character. In all such cases, however, the witness, before being allowed to express his opinion, is required to state the circumstances under which he observed the facts upon which his opinion has been founded, and also to state, so far as possible, what facts he thus observed; and it is then for the judge to decide from that statement, whether, under all the circumstances of the case, an opinion formed upon such observation is competent evidence under this exception; but the subscribing witnesses to a will may state the opinions which they formed at the time of its execution, as to the testator's mental capacity, without first stating the facts upon which that opinion was formed.[91] This distinction, allowing the subscribing witnesses to a will a peculiar privilege, in giving their mere naked opinion in relation to the sanity of the testator at the time of its execution, and denying that privilege to others, is considered by Judge Redfield to be practically and in principle wholly

[91] Abb. Tr. Ev., Ch. V, 64; 1 Redf. Wills, pp. *139, 144; Conn. Mut. Life Ins. Co. v. Lathrop, 111 U. S., 612, 620; Robinson v. Adams, 62 Me., 219; 16 Am. R., 473, 486.

groundless, and an absurd one in itself.[92] He considers it to be based upon the fact that, as the statutes prescribing the method of executing wills generally require that they should be attested by credible or competent witnesses, it is not competent for the courts to say, after the statute has defined the requisites of a witness, that he is not to be regarded as competent to testify to every point directly involved in the issue, whether the paper presented for probate be the will of the alleged testator or not.[93] Indeed, it ought always to be assumed that the subscribing witnesses to a will did regard the testator as of sound mind at the time of executing the will, or they would not have countenanced the act by becoming witnesses, and therefore they can only say that he appeared sane, as they noticed nothing to the contrary; so that the idea of requiring them to state facts in confirmation of such a mere negative opinion would be preposterous.[94] Practically, however, this distinction amounts to very little, for all the facts and circumstances seen or known by the subscribing witness at the time

[92] 1 Redf. on Wills, p. *139
[93] Id., p. *145, note 25.
[94] Id., p. *144, note 22.

of the execution, may always be brought out either on direct or cross-examination, and upon them will depend in a great measure whatever weight is given to his opinion.

§ 52. Opinions of experts on matters requiring special study or experience admissible.—Whenever there is a question as to any point of science or art, or other matter requiring a course of special study or experience in order to the attainment of that degree of knowledge, without which persons are unlikely to prove capable of forming a correct judgment upon it, the opinions upon that point, of witnesses specially skilled or learned in any such matter, are admitted in evidence for the purpose of aiding the jury (or court) to arrive at a correct conclusion from the facts established by the testimony.[95] Such witnesses are usually called *experts,* and whenever it is proposed to examine any witness as an expert, the judge must first decide,

[95] Ste. Dig., art. 49; Best Ev., § 513; 1 Gr. Ev., §§ 440, 440a; Tay. Ev., §§ 1416-1425; 1 Sm. Lead. Cas., Carter v. Boehm, 7th Am. ed., pp. *618, *628, *644; Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S., 469, 472; Hammond v. Woodman, 41 Me., 177; 66 Am., D., 219, and note; Stumore v. Shaw, 68 Md., 11; 11 A., 360; 6 Am. St. R., 412; 2 Elliott Ev., § 1025-1047.

as a preliminary question, whether or not his skill or learning in the matter upon which his opinion is to be asked is sufficient to entitle him to be regarded as an expert.[96] Witnesses thus examined as experts are not permitted to usurp the functions of the jury by giving their opinions as to the general merits of the cause, but are only allowed to state the conclusions which their skill has enabled them to draw from the facts within their own personal knowledge, after having first stated what those facts are; or else to give their opinion upon a hypothetical statement of facts, based on evidence already given by other witnesses.[97] Thus, when the question is whether the death of a certain person was caused by poison, a physician examined as an expert may be asked as to what, in his opinion, would be indicated by the presence of

[96] Ste. Dig., art. 49; Abb. Tr. Ev., Ch. XIX, 22; Tay. Ev., § 48; Bristow v. Sequeville, 6 Ex., 275; Rowley v. L. & N. W. Ry., L. R., 8 Ex., 221; Tucker v. Mass. Cent. Ry., 118 Mass., 547; Del. & Ches. St. Towboat Co. v. Starrs, 69 Pa. St., 41; Com. v. Sturtevant, 117 Mass., 122; 19 Am. R., 401.

[97] 1 Gr. Ev., § 440; Tay. Ev., § 1421; Abb. Tr. Ev., Ch. V, 64; Bradner Ev., p. 371; State v. Maier, 36 W. Va., 757; 15 S. E., 991; People v. McElvaine, 121 N. Y., 250; 18 Am. St. R., 820; Meeker v. Meeker,

symptoms such as other witnesses have testified were exhibited by the deceased; or, if he saw the deceased himself, he may, after detailing the symptoms be observed, state his opinion as to the cause which produced them. So where the question is as to the unwritten law of any foreign country, experts who in their profession are acquainted with such law, may state their opinion as to what the law of that country would be upon a hypothetical state of facts, all of which are sustained by evidence already offered in the case; but the written law must be proved by the production of an authenticated copy of the statute itself, if such copy can be obtained.[98] When skilled witnesses are called upon as experts to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises.[99]

74 Iowa, 352; 37 N. W., 773; 7 Am. St. R., 489; Dexter v. Hall, 15 Wall., 9, 26; Quinn v. Higgins, 63 Wis., 664; 24 N. W., 482; 53 Am. R., 305.

[98] 1 Gr. Ev., § 488; Ennis v. Smith, 14 How., 400, 426; Tay. Ev., § 1425; Baltimore & Ohio R. R. v. Glenn, 28 Md., 287, 322; 92 Am. D., 688, 694.

[99] Tay. Ev., § 1423; 1 Whar. Ev., §§ 438, 666; Ste. Dig., art. 136; Rippon v. Bittel, 30 Wis., 614; Harvey

§ 53. Opinion as to handwriting.—The several rules regulating the admissibility of the opinions of witnesses for the identification of handwriting, being to some extent arbitrary, and by no means uniform, will now be stated separately for convenience, although in strictness they might, perhaps, all be properly referred to one or other of the two preceding exceptions. Thus, under the first exception, any witness acquainted with the handwriting of a person may testify as to whether or not, in his opinion, a writing produced in evidence was written by such person. The acquaintance with a person's handwriting which the witness must possess in order to be competent to express such an opinion, is that he must have actually seen such person write (though only once,) or else have received writings purporting to be written by such person in answer to others written by himself, or under his authority, and addressed to such person: or else have writings purporting to have been written by that person habitually submitted to him in the ordinary course of business.[100] Where a paper

v. State, 40 Ind., 518; Pierson v. Hoag, 47 Barb., 223, 246; Hoffman v. Clack, 77 N. C., 555.

[100] Ste. Dig., art. 51; 1 Gr. Ev., § 577; Tay. Ev.,

admitted or clearly proved to be genuine is already in evidence for some other purpose in a cause, and another paper pertinent to the issue, and alleged to be in the same handwriting, is offered in evidence, it is well settled that the jury (or court) may compare the latter with the former;[101] but upon the question as to whether papers not otherwise in the case may be received and proved for the purpose of comparison, and whether, where such comparison is allowable by the jury, the testimony of experts in regard to it is admissible, there is much conflict in the decisions of the courts of the different states of the Union; but the weight of American authority appears to be against the admission of papers offered merely for the purpose of comparison, and in favor of receiving the opinion of experts upon the point as to whether any two or more papers, properly in evidence, were written by the same person.[102]

§§ 1863-1867; Doe v. Sackermore, 5 A. & E., 705; Rogers v. Ritter, 12 Wall., 317, 320; Hammond Case, 2 Gr., 33; 11 Am. D., 38. But see Reese v. Reese, 90 Pa. St., 89; 35 Am. R., 634.

[101] 1 Gr. Ev., § 578; 2 Elliott Ev., § 1105.

[102] See 1 Gr. Ev., § 581; 1 Whar. Ev., § 712; and Tome v. Parkersburg Br. R. R. Co., 39 Md., 36, where the whole subject is discussed; also Rogers on Expert

But where a writing to be proved is of such antiquity that living witnesses cannot be had, and yet is not old enough to prove itself, experts may always compare it with other documents admitted to be genuine, or proved to have been respected, treated and acted upon as such by all parties, and may give their opinion concerning the genuineness of the writing in question, such opinions being the best evidence attainable under the circumstances.[103]

Testimony, 1897, pp. 285-347, and Lawson on Expert and Opinion Evidence (1883), pp. 375-488, which gives the statute law and decisions in the several states upon the subject very fully. In England, by statute (17 and 18 Vic., c. 125, § 27, and 28 Vic., c. 18, § 8), it is permitted to prove a disputed handwriting by comparison made by witnesses with any other writing introduced into the case for that purpose, which is first proved to the satisfaction of the judge to be genuine; and substantially the same rule has been adopted by statute in the states of Georgia, Iowa, Maryland, New Jersey and Texas. Miles v. Loomis, 75 N. Y., 288; 31 Am. R., 474; White Sewing Machine Co. v. Gordon, 124 Ind., 495; 24 N. E., 1053; 19 Am. St. R., 109; Gaunt v. Harkness, 53 Kan., 405; 36 P., 739; 42 Am. St. R., 297.

[103] 1 Gr. Ev., § 578; Best on Ev., §§ 240-242; Strother v. Lucas, 6 Pet., 763, 767; Clark v. Wyatt, 15 Ind., 271; 77 Am. D., 90.

PART II.

ON PROOF.

CHAPTER I.

ALL FACTS MUST BE PROVED UNLESS JUDICIALLY NOTICED OR ADMITTED.

§ 54. Facts must be proven by the best kind of evidence attainable.—Having considered the rules by which the relevancy of facts is determined, we now come to those prescribing the kinds of proof by which the existence of such relevant facts may be established. These latter may all be said to be nothing more than applications of that distinguishing principle of the English law of evidence, already mentioned, which requires that every fact necessary to be proved shall be proved by the best kind of evidence attainable. This rule relates to the quality of evidence, and not to its quantity, and it operates to exclude only that evidence which itself indicates the existence of more original sources

of information;[1] the true meaning of the rule being, as stated by Lord Chief Baron Gilbert, "that no such evidence shall be brought which, *ex naturâ rei,* supposes still a greater evidence behind in the party's own possession and power."[2] Thus, the offer to prove the contents of a writing by means of a copy, or by mere oral evidence, assumes the existence of a more original source of information, to wit, the writing itself, and therefore the inferior evidence is excluded, unless it be first shown that the writing itself is not in existence or is unattainable; but where there is no substitution of derivative for original evidence, but merely a selection of weaker instead of stronger proofs of the same degree, or an omission to supply all the proofs capable of being produced, the rule is not infringed.[3]

§ 55. Courts disregard all facts not proven in the cause on trial, except in two cases.—As already stated, it is the general rule that courts, in deciding issues of fact, are to be governed solely by such evidence as may have

[1] 1 Gr. Ev., § 82; 1 Starkie Ev., p. 641; Best on Ev., §§ 87-90; 1 Elliott Ev., § 205.

[2] Gilb. Ev., 16, 4th ed.

[3] 1 Gr. Ev., § 82; Tay. Ev., §§ 391, 393.

been produced before them by the respective parties to the proceeding, and should entirely disregard all facts not regularly proven in the cause; but to this rule there are two exceptions, the first being as to certain facts of which the courts take judicial notice, or recognize as within their own knowledge, without requiring any extrinsic proof thereof; and the second being as to such facts as are admitted by both sides.

§ 56. **Facts judicially noticed.**—The courts take judicial notice of certain facts upon one or other of the two following grounds: either because the law makes it the special duty of the court to know them; or else for the reason that they are recognized to be of such universal notoriety within the limits of its jurisdiction as to leave no room for any dispute about them. To require technical proof of such facts would be wasting time to no purpose and subjecting suitors to useless trouble and expense.[4]

I. The first class embraces:

(a) All public laws by which the particular

[4] See 1 Gr. Ev., §§ 4-6a; 1 Whar. Ev., §§ 276-340; Bliss on Code Pl., § 177. See full note on p. 20 of Vol. 124 of Am. St. Rep., under case of Green v. Lineville Drug Co., 150 Ala., 112

court is bound to be controlled in rendering its decisions; for the court must be presumed to know these laws, as otherwise it could not apply them to the case before it. They include the constitution, public statutes and treaties of the United States and of the particular state in which the court is sitting,[5] the law of nations,[6] the law merchant,[7] the common law,[8] and all old English and other statutes which are in force in said states in so far as they constitute a part of the law of the land within the jurisdiction of the court.[9] Inasmuch as the courts of the United States were created by congress not for the purpose of administering the local laws of a single state alone, but to administer the laws of all the states in the Union, they take judicial notice of all such laws in cases to which they respectively apply.[10] The courts, however, do not

[5] 1 Gr. Ev., § 4.

[6] The Scotia, 14 Wall., 170, 188.

[7] Brown v. Piper, 91 U. S., 37, 42; Barnet v. Brandao, 6 M. & G., 630, 665.

[8] Owen v. Boyle, 15 Me., 147; S. C., 32 Am. Dec., 143; 1 Kent Com., 472.

[9] 1 Kent Com., 473; Chouteau v. Pierre, 9 Mo., 3.

[10] Owings v. Hull, 9 Pet., 607, 625; R. R. Co. v. Bk. Ashland, 12 Wall., 226.

take judicial notice of the laws of a foreign country, nor do the courts of one of the United States take judicial notice of the laws of another state, for they are under no legal obligation to administer these laws; and whenever they do adopt them as rules of decision in particular cases arising under them, they only do so from a spirit of comity.[11] Neither do the courts notice judicially private acts of legislation such as legislative grants and charters,[12] for these are regarded as nothing more than contracts between the state in its sovereign capacity and individuals or corporations,[13] and therefore must be proved like any other contracts.

(b) Matters of public interest which, being recognized, established or determined by the law of the land, must be considered to be within the knowledge of all persons, and especially those holding official positions under the government, and thereby constituting a part

[11] Canal Co. v. B. & O. R. R. Co., 4 G. & J., 1, 63; 1 Gr. Ev., §§ 486, 489.

[12] First Nat. Bk. Clarion v. Gruber, 87 Pa. St., 468; S. C., 30 Am. Rep., 378.

[13] Trustees Dartmouth Coll. v. Woodward, 4 Wheat., 518, 643, 656.

of it.[14] These have been held in the United States to include:

(1) The existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, their respective flags and seals of state,[15] and also the public acts and proclamations and public authorized agents of such powers done, made and appointed to carry into effect their treaties with the United States.[16]

(2) Foreign admiralty and maritime courts,[17] notaries[18] and their respective seals, for these are recognized by the law merchant.

(3) The sittings of congress and also of the legislature of the state or territory where the court is held, their established and usual course of procedure, the privileges of the members, and in some cases, the transactions on the journals.[19]

(4) The accession of the chief executive of

[14] Bliss, Code Pl., § 192.

[15] U. S. v. Palmer, 7 Wheat., 610, 634; Church v. Hubbard, 2 Cr., 187, 238; 1 Gr. Ev., § 4.

[16] U. S. v. Reynes, 9 How., 127, 147.

[17] Croudson v. Leonard, 4 Cr., 434.

[18] Nicholls v. Webb, 8 Wheat., 326, 333.

[19] 1 Gr. Ev., § 6; Bliss Code, Pl., § 194.

the nation and of the state or territory in which the court is held; his power and privileges, and the genuineness of his signature;[20] the heads of departments and principal officers of state;[20a] the public seals;[21] the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister;[22] the existence of all courts of the United States and all courts of general jurisdiction in the state or territory where the court is held, and the extent of their jurisdiction;[23] also the existence, jurisdiction and practice of inferior courts of said state or territory in so far as established by its law;[24] the judges and seals of all such courts and their terms so far as the same are regulated

[20] Hizer v. State, 12 Ind., 30; Lindsay v. Atty-Genl., 33 Miss., 508; Jones v. Gale's Ex'r, 4 Martin, 635.

[20a] York, etc., R. R. Co. v. Williams, 17 How., 30, 41; Bennett v. Tennessee, Mart. & Yerg., 133.

[21] Delafield v. Hand, 3 Johns., 310, 314; Den v. Vreelandt, 2 Halst., 553, 555.

[22] Walden v. Canfield, 2 Rob. La. R., 446, 469; Brown v. Piper, 91 U. S., 37, 42.

[23] Dozier v. Joyce, 8 Port. (Ala.), 303.

[24] Bliss on Code, Pl., § 196.

by public law,[25] but not their rules of court;[26] the United States marshals, sheriffs, United States and state district attorneys and clerks of court holding office in said state or territory, and the genuineness of their respective signatures, but not of those of their deputies.[27]

(5) Public proclamations of war and peace[28] and of days of special public fasts and thanksgiving; and stated days of general political elections;[28a] the legal coinage, weights and measures of the country;[29] the territorial extent of the jurisdiction and sovereignty exercised *de facto* by the United States and the state in which the court sits,[30]

[25] Gilland v. Sellers, 2 Ohio St., 223, 226; Lindsay v. Williams, 17 Ala., 229, 231; Newell v. Newton, 10 Pick., 470, 472; Tucker v. State, 11 Md., 322, 329.

[26] Cherry v. Baker, 17 Md., 75.

[27] Ingraham v. State, 27 Ala., 17, 20; Major v. State, 2 Sneed (Tenn.), 11; Ward v. Henry, 19 Wis., 76; S. C., 88 Am. Dec., 672.

[28] Armstrong v. U. S., 13 Wall., 154, 156; Dunning v. New Albany & Salem R. Co., 2 Ind., 437.

[28a] State v. Minnick, 15 Iowa, 123.

[29] Hockin v. Cooke, 4 T. R., 314; United States v. Burns, 5 McLean, 23, 30; Daily v. State, 10 Ind., 536.

[30] Gilbert v. Moline, 19 Iowa, 319.

and the local political divisions of said state into counties, cities, townships, school districts, and the like,[31] and their relative positions, but not their precise boundaries further than described in public statutes; the public surveys and legal subdivisions under the public law;[32] and the courts of the United States take special notice of the ports and waters of the United States where the tide ebbs and flows, and of the boundaries of the several states and judicial districts.[33]

(c) Matters peculiarly within the knowledge of the particular court, as its records, its officers and their deputies,[34] its attorneys,[35] and the signatures of such officers, deputies and attorneys in all their official or professional acts;[36] and county courts generally take judicial notice of the justices of the peace holding office in the counties over which

[31] Winnepiseogee Lake Co. v. Young, 40 N. H., 420, 429; Goodwin v. Appleton, 22 Me., 453, 459; State v. Powers, 25 Conn., 48.

[32] Vanderwerker v. People, 5 Wend., 530; Ham v. Ham, 39 Me., 263, 266.

[33] Brown v. Piper, 91 U. S., 37, 42.

[34] Nowell v. McHenry, 1 Mich., 227.

[35] 1 Chitty's Pl., 220.

[36] State v. Postlewait, 14 Iowa, 446; Masterson v. Le Claire, 4 Minn., 163.

such courts respectively have jurisdiction and of the genuineness of their official signatures.[37]

(d) Matters which the courts are directed by statute to notice judicially.

(e) Matters which take place in the actual presence of the court.

II. The second class of facts judicially noticed embraces all matters so notorious that they may be fairly considered as within the common knowledge or experience of all persons of ordinary intelligence and education within the jurisdiction of the court, and therefore not open to controversy. This class has been held to include.

(1) The general geographical features of the country, state and judicial district where the court is held, as to the existence and location of its principal mountains, rivers and cities,[38] and also the geographical position and distances of foreign countries and cities in so far as the same are matters of universal notoriety.[39]

[37] Chambers v. People, 5 Ill. (4 Scam.), 351.

[38] Mossman v. Forrest, 27 Ind., 233, 236; Winnepiseogee Lake Co. v. Young, 40 N. H., 420, 429.

[39] Whitney v. Gauche, 11 La. Ann., 432; Richardson v. Williams, 2 Porter (Ala.), 239, 243.

(2) Any matters of public history affecting the whole people, and also public matters affecting the national government or that of the state, district or county where the court is held.[40]

(3) All things which must have happened according to the course of nature, as the ordinary limitation of human life as to age, the course of time and of the heavenly bodies, the mutations of the seasons and their general relation to the maturity of crops.[41]

(4) The ordinary public feasts and festivals;[42] the coincidence of days of the week with days of the month.[43]

(5) The meaning of words in the vernacular language, but not of catch-words, technical, local or slang expressions.[44]

[40] Bank of Augusta v. Earle, 13 Peters, 490; Ohio Life Ins. & Tr. Co. v. Debolt, 16 How., 416, 435; 1 Whar. Ev., § 338; Bliss, Code Pl., § 190.

[41] Patterson v. McCausland, 3 Bland. Chy., 69; Floyd v. Johnson, 2 Litt. (Ky.), 109, 113; 13 Am. Dec., 255; Bryan v. Beckley, 6 id., 91, 95; Bowen v. Read, 103 Mass., 46, 48.

[42] Sasscer v. Farmers' Bank, 4 Md., 409, 420.

[43] Allman v. Owen, 31 Ala., 167, 171.

[44] Commonwealth v. Kneeland, 20 Pick., 206, 216; Balto. v. State, 15 Md., 276, 484.

(6) Such ordinary abbreviations as by common use may be regarded as universally understood, as abbreviations of Christian names, and the like,[45] but not those which are in any degree doubtful or difficult of interpretation.[46]

(7) The character of the general circulating medium and the public language in reference to it,[47] but not the current value of the notes of a bank at any particular time.[48]

(8) Other matters of general notoriety as the manner in which railroad business is conducted.[49]

If the judge's memory be at fault, or if he is uncertain in reference to any fact which he is called upon to notice judicially, he may refer to any person or to any document or book of reference that he deems worthy of confidence in order to satisfy himself in relation

[45] Stephen v. State, 11 Geo., 225, 240; Mosely v. Masten, 37 Ala., 216; Gordon v. Holliday, 1 Wash. C. C., 285, 289.

[46] Ellis v. Park, 8 Texas, 205.

[47] Lampton v. Haggard, 3 Mon., 149.

[48] Feemster v. Ringo, 5 Mon., 336; Modawell v. Holmes, 40 Ala., 391.

[49] Cleveland R. R. Co. v. Jenkins, 174 Ill., 398; 51 N. E., 811; 66 Am. St. R., 294; 62 L. R. A., 992.

thereto; or may refuse to take judicial notice of such fact, unless and until the party calling upon him to do so shall produce such document or book of reference.[50] This extends to such matters of science as are involved in the cases brought before him.[51]

§ 57. Facts expressly admitted by the parties, either by their pleadings or at the hearing, in all proceedings inter partes.— There would obviously be no propriety in requiring evidence to be given in proof of any fact which the parties to the proceeding, or their agents, agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings; for the object of introducing evidence at all is to enable the court to decide the controversy between the parties, and there can be no controversy over facts thus admitted.[52] But proof of facts necessary to be proved by the prosecution on an indictment for felony may not be dispensed with by any admissions, made by the *counsel* of the accused, unless made *at the trial,* and conse-

[50] Ste. Dig., art. 59; 1 Gr. Ev., § 6; Tay. Ev., § 21.
[51] Brown v. Piper, 91 U. S., 37, 42.
[52] Ste. Dig., art. 60.

quently in the presence of the accused.[53] This exception is made probably upon the ground that, should the latter suffer conviction and punishment through an unauthorized admission of his counsel, he could not afterwards obtain adequate redress from him for the injury, as might be done by a person who had lost a civil suit from the same cause. So, also, in prosecutions for murder, courts will not ordinarily permit a conviction upon the mere confession of the prisoner, without some corroborative evidence, either direct or circumstantial, of the actual commission of the crime; for it might happen that the prisoner, having attempted the life of a person successfully, as he supposed, might afterwards confess having killed him, when in fact the supposed murdered man might have actually escaped.[54] It must be understood, moreover, that this rule dispensing with proof of the facts admitted is applicable only to actions instituted *inter partes* and not to proceedings to obtain a judgment *in rem,* which has been defined to be "an adjudication pronounced,

[53] Ste. Dig., art. 60; 1 Phil. Ev., 4th Am. ed., p. 524.

[54] 1 Bishop on Crim. Proc., §§ 1056-9; United States v. Williams, 1 Clif. C. C., 5.

as its name indeed denotes, upon the status of some subject matter by a tribunal having authority for that purpose" and which has the characteristic quality that it furnishes in general *conclusive* proof of the facts adjudicated as well against strangers as against parties.[55] As the admission of a fact is not proof of it, but merely a waiver of proof, which, as such, can be binding only on the person who makes it and those claiming through or under him, the court, before rendering a judgment *in rem* to be conclusive against a stranger, must have before it competent legal evidence from which to find the facts required to support such a judgment in the testimony of witness rendered under all the safeguards demanded by law.[56]

[55] Taylor Ev., § 1674, citing 2 Smith L. C., 785, note on Duchess of Kingston's case.

[56] §§ 17, 55 *ante*, § 58, *post*.

CHAPTER II.

ORAL EVIDENCE.

§ 58. All ultimate facts to be proven must be established by direct oral testimony, except in four enumerated cases.—Ordinarily the most natural and satisfactory method of proving the existence or non-existence of any fact, is by the direct oral testimony of witnesses who have perceived its existence or non-existence by the operation of their own senses or consciousness, and therefore this is the means most generally resorted to for that purpose; and it is permissible to employ it in all cases, excepting (1) where the fact sought to be established or denied is in contradiction of a conclusive presumption of law; or (2) unless it be a transaction of a public nature of which the law requires an official record to be kept; or (3) unless the fact to be proved be the contents of a document; or (4) the terms of some contract or grant which the parties have reduced to writing, and which is sought to be proved by a party thereto, or his representative in interest, for the purpose

of enforcing, varying or denying some right or liability thereunder. Subject to these exceptions, which will be considered particularly hereafter, all the ultimate facts which form the ground of the decision of a court or jury upon an issue of fact (excepting such facts as are admitted or judicially noticed, and those which actually take place at the trial), are required to be established by direct oral evidence. By the term ultimate fact is meant any fact which a witness has actually perceived by his senses, and which is not merely inferred from the existence or non-existence of some other fact or facts; but every fact from which another fact is inferred must either be an ultimate fact itself, or else have been established either mediately or immediately by inference from other ultimate facts. The rule thus laid down is intended to include the production in court and submission to its inspection of all documents and other things (sometimes called demonstrative or real evidence) for the purpose of confirming, explaining or supplementing the oral statements of the witnesses introducing them, and which are always necessary to prove the facts establishing their connection with or relation to the questions at issue, and without which they could not be received, unless they

are such officially certified documents as the law provides shall prove themselves. For example, in an action for breach of contract, the contract cannot be received in evidence without oral proof that it was executed by or on behalf of the party sought to be charged under it; at the trial of an indictment for homicide the lethal weapons with which the crime is supposed to have been committed may not be exhibited in evidence without oral proof of facts tending to connect them in some way either with the crime or with the accused; so also in an action for damages for the infringement of a patent when the patented article and the thing alleged to be an infringement of it are brought into Court, neither can be received in evidence for comparison with the other until after testimony has been given by witnesses to show that the one is the identical thing for which the plaintiff holds his patent, and the other has been either made, used or sold by the defendant. So that in all these cases it is the oral testimony of witnesses which furnishes the ultimate facts upon which the admissibility and value of the so-called real or demonstrative evidence depend.

§ 59. How oral evidence may be taken.— The term oral evidence as used in this connec-

tion includes all testimony given by signs or writing by witnesses unable to speak. It may be taken in open Court according to the rules hereinafter set forth relating to the examination of witnesses, or may be taken out of Court for future use in Court—

(a) Under a commission in the manner prescribed by its terms, or by the rules of Court or the statute regulating the mode of executing the same; or

(b) By deposition before any officer of Court or other person or persons appointed for that purpose, either by agreement of the parties or otherwise under the provisions of any statute or rule of Court governing the tribunal in which said evidence is to be used; but such depositions are to be taken only in the manner and under the circumstances prescribed, and are to be used only for the purposes and upon the contingencies expressly provided by the terms of such agreement or statute or rule of Court.

§ 60. **Oral evidence must be direct, but may be supplemented by demonstrative proofs.**—If it refers to a fact alleged to have been seen it must be the evidence of a witness who says he saw it; if it refers to a fact alleged to have been heard it must be the evidence of a witness who says he heard it; if it

refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on such grounds.

As above stated, a witness by his oral testimony often identifies documents and other demonstrative evidence and states facts observed by him connecting them in some way with the issues on trial and thereby renders them admissible in evidence as explanatory of and supplementary to his verbal statements of which they thereby thus become a part. So also a witness in describing the place where something that he saw occurred can often best convey his meaning by the aid of a rough diagram drawn by himself showing his recollection of the relative positions of the persons or things as to which he testifies and their comparative distances from each other. Such a diagram would be admissible as illustrating and being a part of his verbal testimony, and could be afterwards further supplemented by a more elaborate

[1] Ste. Dig., art. 62.

plat made by a competent draftsman who testifies it was drawn to a scale upon measurements made by himself, at the place referred to while the conditions there remained the same.

§ 61. **Photographs.**—So also photographs of places, persons and things described in the oral testimony of witnesses, may be admitted in evidence to show the appearance presented by them at the time such photographs were taken if such appearance be deemed by the Court to be relevant to the issues on trial, upon satisfactory proof of their correctness being furnished.[2]

(1) The proof required of the accuracy of a photograph varies with the nature of the evidence the photograph is offered to supply. Where it is offered only as a general representation of physical objects as to which testimony is adduced, for the mere convenience of witnesses in explaining their statements, very slight proof of accuracy may be sufficient and may be supplied by other witnesses than the person who took and produced it.[3]

[2] Baustian v. Young, 152 Mo., 317, 372; 53 S. W., 921; 75 Am. St. Rep., 462, with extended note on p. 468; State v. Matheson, 130 Iowa, 440; 103 N. W., 137; 114 Am. St. Rep., 427 and note p. 437.

[3] *Supra,* citing Cunningham v. Fairhaven, etc., R.

And photographs taken by a person who is not skilled in photography have been admitted in evidence where eye witnesses testified they were truthful representations of the scene or objects they purported to represent.[4]

But when photographs are offered as direct evidence of things which have not been directly described by a witness as having come within his observation, or where they are offered as representing handwriting which is to be subjected to minute and detailed examination, or any object where slight differences in height, breadth or length is of vital importance, much more convincing proof is required, for it is well known that a photograph may, through the want of skill of the photographer or through his intentional and

R. Co., 77 Conn., 244; 60 A., 107; Nies v. Broadhead, 75 Hun., 255; Dorsey v. Habersack, 84 Md., 117; 35 A., 96; Turner v. Boston, 158 Mass., 261; 33 N. E., 520; Archer v. N. Y., etc., R. R., 106 N. Y., 590; 13 N. E., 318; Consolidated Gas Co. v. Smith, 109 Md., 186, 199; 72 A., 651.

[4] N. Y., etc., R. R. Co. v. Moore, 105 Fed. 725; Blair v. Pelham, 118 Mass., 420; Carlson v. Benton, 66 Neb., 486; 92 N. W. 600.

skillful manipulations, be inaccurate and even misleading.[5]

The admissibility of a photograph in evidence, and the sufficiency of the preliminary proofs to identify it or show that it is a fair or accurate representation of the objects which it purports to portray, are questions committed largely to the trial judge whose decisions will rarely be reversed by the appellate court,[6] although his discretion is not unlimited and may not be exercised arbitrarily.[7]

It has also been held in a number of recent cases that X Ray photographs, or sciographs, or radiographs, as they are variously called,

[5] Cunningham v. Fair Haven, etc., *supra;* United States v. Ortiz, 176 U. S., 422, 430; Beardslee v. Columbia Township, 188 Pa. St., 496; 41 A., 617; 68 Am. St. Rep., 883; Martin v. Moore, 99 Md., 41, 49; 57 A., 671.

[6] Sellick v. Janesville, 104 Wis., 570; 80 N. W., 544; 76 Am. St. Rep., 892; Blair v. Pelham, 118 Mass., 420; Mauch v. Hartford, 112 Wis., 40; 87 N. W. 816; Van Houton v. Morse, 162 Mass., 414; 38 N. E., 705; 44 Am. St. Rep., 373; 26 L. R. A., 430.

[7] DeForge v. N. Y., etc., R. R., 178 Mass., 59; 59 N. E., 669; 86 Am. St. Rep., 464; State v. Cook, 75 Conn., 267; 53 A., 589; Lake Erie, etc., R. R. Co. v. Wilson, 189 Ill., 89; 59 N. E., 573; Consolidated Gas Co. v. Smith, *supra.*

showing the interior conditions of a human body or limb which are beyond the observation of the eye, are admissible as independent evidence of such condition after proof that they have been properly taken and produced by a competent person.[8]

§ 62. Communication by telephone.—When it is material to prove what a person said at any time, a witness who heard him say it over the telephone is competent to prove this fact as direct evidence, provided he can also testify that he recognized the voice of the speak-

[8] State v. Matheson, *supra;* City of Geneva v. Burnett, 65 Neb., 464; 91 N. W., 275; 101 Am. St. Rep., 628; 58 L. R. A., 257; Chicao, etc., Ry. Co. v. Spence, 213 Ill., 220; 72 N. E., 796; 104 Am. St. Rep., 213. In the case of Carlson v. Benton, 66 Neb., 486; 92 N. W., 600, the Court held that to constitute the foundation for such a photograph it is not essential that it appear that it was taken by a competent person nor that the condition of the apparatus with which it was taken and the circumstances under which it was taken, were such as to secure accuracy, where it was shown by the evidence of competent witnesses that it truly represented the object it is claimed to represent. But how witnesses could be competent to testify to the accuracy of its representation under the circumstances does not seem quite clear.

er.[9] It has also been held that a conversation over the telephone with a person called up at his private office is admissible in evidence against him even though the person who testified to having heard it did not recognize the speaker's voice.[10] The ground for this is stated to be that when a person places himself in connection with the telephone system through an instrument in his office, he thereby invites conversation in relation to his business through that channel, and therefore conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the

[9] People v. Ward, 3 N. Y. Crim. R., 483, 511; Murphy v. Jack, 142 N. Y., 215; 36 N. E., 882; 40 Am. St. R., 500.

[10] Wolfe v. Mo. Pacific Ry. Co., 97 Mo., 473; 11 S. W., 49; 10 Am. St. Rep., 331; 3 L. R. A., 539; Mo. Pacific Ry. Co. v. Heidenheimer, 82 Texas, 195; 17 S. W., 608; 27 Am. St. Rep., 861; Shawyer v. Chamberlain, 113 Iowa, 742; 84 Mo., 661; 86 Am. St. Rep., 411; Knickerbocker Co. v. Gardiner Co., 107 Md., 556, 571; 69 A., 405; General Hospital Soc. v. N. H. Rendering Co., 79 Conn., 581; 65 A., 1065; Kansas City Star Co. v. Standard Warehouse Co., 123 Mo., Ap., 13; 99 S. W., 765; Godair v. Ham. Nat. Bk., 225 Ill., 572; 80 N. E., 407; 116 Am. St. Rep., 172.

business there carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible.[11] Some of the Courts have gone further and admitted conversation by telephone in evidence where the messages were transmitted by a third party. Thus where the plaintiff directed the operator on a long distance telephone to call up a certain person at a distant point and to converse with him asking the questions and repeating the replies as they were given to him, the Court held the operator to be the agent of both parties and permitted the plaintiff to give the whole conversation in evidence.[12]

[11] Wolfe v. Mo. Pacific Ry. Co., *supra,* but the burden of proof always rests upon the party introducing the evidence to establish by some proof either direct or circumstantial, the identity of the person speaking: Young v. Seattle Trans. Co., 33 Washington, 225; 74 P., 375; 99 Am. St. Rep., 942; 63 L. R. A., 988.

[12] Sullivan v. Kuykendall, 82 Ky., 483; 56 Am. Rep., 901, followed in Oskamp v. Gadsden, 35 Neb., 7; 52 N. W., 718; 37 Am. St. Rep., 428; 17 L. R. A., 440. In the case of Banning v. Banning, 80 Cal., 271; 22 P., 210; 13 Am. St. Rep., 156, where it appeared that an acknowledgment of a deed had been made by a married woman over the telephone to a Notary who

§ 63. Phonographic records.—If a witness may testify as to what he heard a person say over the telephone, there would seem to be no reason why he should be excluded from also testifying what he may have heard such person say through a phonograph, provided he could testify as to his recognition of the person's voice as heard through it and also that the phonographic record was taken at a time when the speaking of the words therein recorded would make them material evidence upon the issues on trial. In such a case the record should itself be produced in Court and heard as the best evidence as to what was actually spoken into the phonograph, after its introduction by extraneous proof of the identification of the voice speaking through it and of the time, place and circumstances under which such record was made. It has accordingly been held that the trial judge committed no error when in a condemnation case he permitted the defendant to operate a phonograph in the presence of the jury to

was three or four miles distant, it was held that this did not invalidate the deed, because in the absence of fraud, accident or mistake the Notary's certificate in due form is conclusive of the material facts therein stated.

reproduce sounds claimed to have been made by the operator of trains in the vicinity of the latter's hotel, the appellate court saying that with proper proofs such as were given in the case to justify the introduction of the instrument as a substantially accurate and trustworthy reproducer of the sounds actually made and testified to, it thought its use legitimate. It further added that the ground for receiving the testimony of the phonograph seemed to be the same as that for the admission of communication by telephones and even stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves.[13]

[13] Boyne City, etc., R. R. Co. v. Anderson, 146 Mich., 328; 109 N. W., 429; 117 Am. St. Rep., 642; 8 L. N. S., 306 case note.

CHAPTER III.

WHEN ORAL EVIDENCE EXCLUDED.

§ 64. Conclusive presumptions of law may not be contradicted by oral evidence—Conclusive presumptions — Estoppels. — Conclusive presumptions of law have been defined as rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection between the facts presumed, and those forming the ground of the presumption, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty and the promotion of peace and quiet in the community, and therefore it is that all corroborating evidence is dispensed with, and all opposing evi-

dence is forbidden.[1] Whenever, therefore, any fact in issue is sought to be established by proof of other facts from which it follows as a conclusive presumption of law, the existence of such fact in issue cannot be controverted by direct oral evidence, but only by proof contradicting the existence of the alleged facts from which it would be presumed. These conclusive presumptions are sometimes expressly declared by statute, as in certain statutes of limitation, whereby if a debt has not been expressly recognized within a certain number of years as a subsisting obligation, it is conclusively presumed to have been satisfied.[2] In other cases these conclusive presumptions are declared by the courts as part of the common law.[3] The principal con-

[1] 1 Gr. Ev., § 15.

[2] Id., § 16.

[3] Id., § 17. Several presumptions of law asserted by Best, Greenleaf, Taylor and other writers to be conclusive are now regarded by the courts as open to contradiction by evidence. There is now a decided tendency to reduce the number and to limit the scope of indisputable presumptions, which is probably best explained by Dr. Wharton's remark (Whar. Ev., § 1234) that "practical jurisprudence soon discovers that a presumption that is irrebuttable in an age of ignorance is rebuttable in an age of civilization."

clusive presumptions at common law are as follows:

Where the possession and enjoyment of property has been uninterrupted, exclusive and adverse to all others for a period of twenty years, the possessor is conclusively presumed to have a good title thereto.[4]

Conclusive presumptions are also made in favor of the correctness of the records of judicial proceedings, and that a party to a record was interested in the suit; and after verdict it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, although they are not expressly alleged in the record, *provided* it contains terms sufficiently general to comprehend them in fair and reasonable intendment. The presumption will also be made, after twenty years, in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings.[5] The extent to which judgments are held to be conclusive proof of the matters thereby determined has been already discussed in sections 36-40, *ante*.

A bond or other instrument under seal is,

[4] 1 Gr. Ev., § 18.
[5] Id., § 19.

as between the parties thereto and their privies, conclusively presumed to have been made upon good consideration as long as the instrument remains unimpeached.[6]

Where authority has been given by law to do a certain act in a prescribed manner, the lapse of a sufficient time (which is in most cases fixed at thirty years) raises a conclusive presumption that all legal formalities which are not required to be made matter of record have been duly complied with; for great uncertainty of titles and other public mischiefs would result, if strict proof were required of facts so transitory in their nature, and the evidence of which would generally be unattainable after so long a time.[7]

Conclusive presumptions are made in respect to infants; as that one under seven years of age is incapable of committing a felony for want of discretion; that a girl under ten years old is incapable of consenting to sexual intercourse, and that a boy under fourteen is incapable of committing a rape.[8]

[6] 1 Gr. Ev., § 19.

[7] Id., § 20.

[8] While the common-law presumption that a boy under fourteen is incapable of committing a rape is

Any child whose mother had a husband living at any time when it could, in the ordinary course of nature, have been begotten, is conclusively presumed to be the legitimate child of such husband unless the mother is divorced from him a *mensâ et thoro,* or unless impotence or non-access of the husband be proven and neither the testimony of the husband or the wife, nor any declarations made by either of them, is admissible testimony for the purpose of proving non-access.[9]

still recognized as conclusive in some of the United States, the present tendency of the courts in this country is to regard it as a rebuttable presumption only that may be overcome by proof that he has attained the age of puberty and has physical capacity to consummate the crime. See cases cited in note to Smith v. State, 80 Am. Dec., p. 363.

[9] 1 Gr. Ev., § 28; Ste. Dig., art. 98; Tay. Ev., §§ 106, 950; 1 Whar. Ev., § 608; 2 id., §1298; Scanlon v. Walshe, 81 Md., 118, 130; 31 A., 498; 48 Am. St. R., 488. All these text-books, as well as all the cases that I know of, except Woodward v. Blue, 107 N. C., 407; 12 S. E., 453; 22 Am. St. R., 897; 10 L. R. A., 663, and Bullock v. Knox, 96 Ala., 195, 198; 11 So., 339, lay down the law as above stated, yet it is very questionable whether any court of last resort would hold that a mulatto child must be conclusively presumed to be the legitimate offspring of white par-

Estoppels may also be included in the list of conclusive presumptions. Whenever one person, by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act to his injury upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned, nor his representative in interest, is allowed, in any suit or proceeding between himself and such other person, or his representative in interest, to deny the truth of that thing.[10] This is nothing more than a practical application of the doctrine of natural justice, which does not permit a man to take advantage of his own wrongful act;

ents. The exclusion of the testimony of either husband or wife upon the question of non-access is according to Lord Mansfield, in Goodright v. Moss, 2 Cowp. 594, "founded in decency, morality and public policy." But while these considerations might well forbid them to testify as to the fact of intercourse *vel non*, it is difficult to see why a husband who has been continuously absent from the state for a year or more prior to the birth of his wife's child should be forbidden to testify as to that fact.

[10] Ste. Dig., art. 102; Ketchum v. Duncan, 96 U. S., 659, 666. See, also, title Estoppel in Amer. & English Encyclopedia of Law.

and it has been extended to cases where one party, by a culpable want of care, which it was his duty to have exercised towards another, has caused the latter to be misled by the fraud of a third party; thus, where a customer keeping an account at a bank, draws a check so carelessly that the amount for which it is given is fraudulently raised by the insertion of additional words and figures before presentation, and the bank pays it in good faith, such customer is not permitted to deny, as against the bank, that such check was originally drawn by him for the full amount paid by it.[11] Among the cases to which this doctrine of estoppel is most frequently applied, is that of the acceptor of a bill of exchange, who is not permitted to deny the signature of the drawer or his capacity to draw or indorse the bill, nor, if it be drawn by procuration, the authority of the agent to draw it;[12] and also that of a person having

[11] Young v. Grote, 4 Bing., 253; Ste. Dig., art. 102, illustration (e); Hardy v. Chesapeake Bank, 51 Md., 562; 34 Am. R., 325; Leather Mfrs. Bank v. Morgan, 117 U. S., 96. But see Burrows v. Klunk, 70 Md., 451, 457; 17 A., 378; 3 L. R. A., 576.

[12] Ste. Dig., art. 104; United States Bank v. Bank of Georgia, 10 Wheat., 333, 353; Nat. Park Bank v. Ninth Nat. Bank of N. Y., 46 N. Y., 77; 7 Am. R.,

possession of any property, real or personal, either as tenant, licensee, bailee, or agent of another, who is not permitted, during the continuance of such possession, to deny that his lessor, licensor, bailor or principal had a right to the possession of such property at the time when the same was so leased or entrusted to him.[13] As a general rule, also, the parties to a deed and their privies are not permitted, as against each other, to dispute any matter recited therein, nor may the grantor deny that he had any title in the thing granted.[14]

§ 65. Oral testimony excluded as to matters of which the law requires a full official record to be kept.—Direct oral evidence may

310; 1 Chalm. Dig., Bills Exch., art. 212. As to how far parties to negotiable paper are incompetent witnesses to impeach, etc., see sec. 99, *post*.

[13] Ste. Dig., arts. 103, 105; Kinsman v. Parkhurst, 18 How., 289, 292; Howe v. Simmons, 1 Cal., 119; 52 Am. D., 290; The Idaho, 93 U. S., 575; Burton v. Wilkinson, 18 Vt., 186; 46 Am. D., 145; Pulliam v. Burlingame, 81 Mo., 111; 51 Am. R., 229.

[14] 1 Gr. Ev., §§ 23, 24; Tay. Ev., §§ 96, 97; Van Renssaler v. Kearney, 11 How., 297, 325; Reichard v. Va. Lead Mining Co., 107 Mo., 616; 18 S. W., 17; 28 Am. St. R., 441; Cobb v. Oldfield, 151 Ill., 540; 38 N. E., 142; 42 Am. St. R., 263; 2 Ell. Ev., § 1538.

not ordinarily be given of any transaction of a public nature, of which the law requires a full official record to be kept. Thus, judicial proceedings must be proved from the records of the court, and not by the oral testimony of persons who were present at the trial.[16] But any facts connected with the trial, which were not proper to be incorporated in the record and are not inconsistent therewith, may, when relevant, be proved by parol testimony;[17] thus, when the record of a former suit between the same parties is offered in evidence to bar the plaintiff's right of action, and such record does not clearly show that the matter in controversy in the second suit was necessarily and directly decided by the jury in the former action, parol evidence, consistent with the record, may be received as to what points were in controversy at the

[15] Johnson v. Masonic Lodge No. 33, 106 Ky., 838; 51 S. W., 620; see, also, Toledo, etc., Co. v. Glenn Mfg. Co., 55 O. St., 219; 45 N. E., 197; Oklahoma, etc., Co. v. F. W. Wolf Co., 118 Fed., 239.

[16] 1 Whar. Ev., § 63; Adams v. Betz, 1 Watts, 425; 26 Am. D., 79; Lyon v. Bolling, 14 Ala., 753; 48 Am. D., 122; Embden v. Lishernen, 89 Me., 578; 56 Am. St. R., 442.

[17] Whar. Ev., § 64; Fahey v. Esterly Machine Co., 3 N. Dak., 320; 44 Am. St. R., 554, and note.

former trial, what testimony was given, and what questions were submitted to the jury for their consideration.[18] So, also, acts of the legislative or executive departments of the government, in so far as the law requires that they shall be officially recorded, must be proved (unless judicially noticed) by such official records.[19] This rule is founded upon the theory that an official record, made at the time for the benefit of the public, by its agents duly authorized and appointed for that purpose, is, so far as it goes, the best attainable evidence of such matters, and therefore, to that extent, always exclude oral evidence, as inferior in quality.

§ 66. The contents of a written instrument can only be proved by production of the document itself, except in certain cases.—Upon the same principle, when the contents of any written instrument are to be proved, the best kind of evidence is by the production of the document itself, which is called primary evidence. This excludes all other or secondary evidence of its contents, excepting admissions

[18] Packet Co. v. Sickles, 5 Wall., 580, 592.

[19] 1 Gr. Ev., §§ 479, 480; 1 Whar. Ev., § 65; Atwood v. Winterport, 60 Me., 252; Elliott v. Piersoll, 1 Pet., 328, 340.

made by the opposite party or his representatives, unless the document in question be a public one, or is the subject of special statutory provision, or its production is out of the party's power, or when the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection, in which cases secondary evidence of their contents is admitted to the extent hereafter stated.[20] But the rule does not apply to cases where the inquiry into the contents of a document comes up collaterally at the trial, and where they are not directly involved in the controversy.[21] Whenever a document is executed in several parts, each

[20] Ste. Dig., arts. 65, 71; Georgia, etc., Ry. Co. v. Strickland, 80 Ga., 776; 6 S. E. 27; 12 Am. St. R., 282. As to proof by admissions of opposing party, see 1 Gr. Ev., § 69; Best on Ev., § 525; Slatterie v. Pooley, 6 M. & W., 664; Smith v. Palmer, 5 Cush., 513, 520; Loomis v. Wadham, 8 Gray, 557; Hoefling v. Hambleton, 84 Tex., 517; 19 S. W., 689; Morey v. Hoyt, 62 Conn., 542, 557; 26 A., 127. *Contra*, Welland Canal Co. v. Hathaway, 8 Wend., 480; 24 Am. D., 51. As to other exceptions, see secs. 71, 73, *post*.

[21] Faulcon v. Johnson, 102 N. C., 264; 11 Am. St. R., 737. Comp. secs. 68, 76, *post;* Jones v. Hoard, 59 Ark., 42; 43 Am. St. R., 17, 19.

part is primary evidence; and when it is executed in counterpart, each counterpart being executed by one or more of the parties only, each counterpart is primary evidence as against the parties who executed it.[22] When a number of documents are all made by printing, lithography or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest; but when they are all copies of a common original, no one of them is primary evidence of the contents of the original.[23] When carbon sheets are inserted between two or more sheets of writing paper so that the writing of a contract upon the outside sheet, including the signature of the party to be charged thereby, produces a facsimile upon the sheets beneath, such signature being thus reproduced by the same stroke of the pen which made the surface or exposed impression, all of the sheets so written on are regarded as duplicate originals and either of them may be

[22] Ste. Dig., art. 64; Roe d. West v. Davis, 7 East, 362; Cleveland R. R. v. Perkins, 17 Mich., 296, 299.

[23] Ste. Dig., art. 64; 1 Whar. Ev., § 92; R. v. Watson, 2 Star., 129; Noden v. Murray, 2 Camp., 224; Foot v. Bentley, 44 N. Y., 166; 4 Am. R., 652.

introduced in evidence as such without accounting for the nonproduction of the others.[24] But of course this does not apply to carbon copies which do not include the signature made at the same time and by the same process, or which leave anything to be added before the document has been fully executed as a binding obligation, for such imperfect carbon copies would be, like letter press copies, only secondary evidence. The original paper sent to a telegraph office is primary evidence of the message sent as against the sender, but not of the message received at the place of its delivery. The telegram delivered to the person addressed is primary evidence as against him of the communication he received, but only secondary evidence of the message that was sent to him.[25]

[24] International Harvester Co. v. Elfstrom, 101 Minn., 263; 112 N. W., 252; 118 Am. St. R., 626; 12 L. N. S., 343.

[25] Smith v. Easton, 54 Md., 138; 39 Am. R., 355; Oregon Steamship Co. v. Otis, 100 N. Y., 446; 3 N. E., 485; 53 Am. R., 221; Conyers v. Postal Tel. Cable Co., 92 Ga., 619; 19 S. E., 253; 44 Am. St. R., 100. Upon proof of delivery of the message at the office properly addressed for transmission, a disputable presumption of fact arises that the telegram reached its destination. Oregon Steamship Co. v. Otis, *supra*.

§ 67. Attested documents must be proved by at least one of the subscribing witnesses, if any such is alive or can be found.—Whenever any document to be proved has been attested by one or more subscribing witnesses, it may not be used in evidence except as hereinafter mentioned, if there be an attesting witness alive, sane and subject to the process of the court, until at least one attesting witness has been called for the purpose of proving its execution; and if no such attesting witness is alive or can be found, the signatures of at least one of the attesting witnesses and of the person or persons who executed the instrument must be proved.[26] This rule has been extended to cases where the document has

In the following cases the message received has been held primary evidence of the message sent, upon the ground that the sender made the telegraph company his agent; Saveland v. Green, 40 Wis., 431; Morgan v. People, 59 Ill., 58; Wilson v. Minneapolis, etc., Co., 31 Minn., 483; 18 N. W., 291; Magie v. Herman, 50 Minn., 424; 52 N. W., 909; 36 Am. St. R., 660; Ayer v. W. U. Tel. Co., 79 Me., 493; 10 A., 495; W. U. T. Co. v. Shotter, 71 Ga., 760. But there must be some preliminary proof of the agency of the company. Culver v. Warren, 36 Kan., 391; 13 P., 577.

[26] Ste. Dig., art. 66; 1 Whar. Ev., § 723; Citizens' Bank v. Steamboat Co., 2 Story, 16; 5 Fed. Cas., 719, 728.

been burnt or canceled;[27] where the subscribing witness was blind;[28] where the party who executed the document was prepared to testify to his own execution of it;[29] and where the party offering the document was prepared to prove an admission of its execution by the person who executed it.[30] The reason assigned for this rule is that some fact may be known to the subscribing witness not within the knowledge or recollection of the person who executed the instrument, and that the latter is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction;[31] but when the adverse party to the cause chooses deliberately to waive this privilege by admitting the execution of the instrument in reference to the cause,[32] or where, having produced the in-

[27] Gillies v. Smither, 2 Star. R., 528; Breton v. Cope, Pea. R., 43.

[28] Cronk v. Frith, 9 C. & P., 197.

[29] R. v. Harringworth, 4 M. & S., 353; Story v. Lovett, 1 E. D. Smith, 153; Brigham v. Palmer, 3 Allen, 450. Contra, Forsythe v. Hardin, 62 Ill., 206.

[30] Call v. Dunning, 4 Ea., 53; Fox v. Reid, 3 Johns., 477; Turner v. Green, 2 Cranch, C. C., 202.

[31] 1 Gr. Ev., § 569.

[32] Ste. Dig., art. 66; 1 Gr. Ev., § 572; Freeman v. Steggall, 14 Q. B., 203.

strument pursuant to notice, he admits its validity by claiming an interest under it in the subject-matter of the cause, and still subsisting at the time of trial,[33] this reason ceases to exist, and in such cases no further proof of the execution than such admission is required. But if, when the attesting witness is examined, he denies or does not recollect having seen the document executed, the fact of its execution may then be established by any other evidence, for it would be manifestly unjust that a party should be concluded by the testimony of a witness whom the law compels him to call.[34]

§ 68. Exceptions to rule requiring attesting witnesses to be examined.—The exceptions to the rule requiring attesting witnesses to be called to prove the execution of documents are: (1) Where the instrument is thirty years old, and comes from the proper custody; in which case, as we shall presently see,[35] it may

[33] Ste. Dig., art. 67; 1 Gr. Ev., § 571; Pearce v. Hooper, 3 Tau., 60; McGregor v. Wait, 10 Gray, 72; 69 Am. D., 305.

[34] Ste. Dig., art. 68; 1 Gr. Ev., § 572; 1 Whar. Ev., § 730; Thomas v. Le Baron, 8 Metc., 355; Hall v. Phelps, 2 Johns., 451.

[35] *Post*, § 79.

be said to prove itself, it being presumed that the subscribing witnesses are all dead, and that other proof of its execution is beyond the reach of the party.[36] (2) Where the instrument is shown or appears to be in the possession or power of the adverse party, who, after due notice, has refused to produce it when called for; in which case, the latter, having by such refusal driven his opponent to give secondary evidence of its contents, cannot then change his mind, produce the original, and object to its admissibility without the evidence of an attesting witness;[37] for the law, by allowing this, would encourage the withholding of material evidence. (3) Where the instrument is not directly in issue, but comes incidentally in question in the course of the trial;[38] thus, where A. sues B. upon an agreement to pay him for certain work the same price which C. had contracted to give him for similar services, the contract

[36] 1 Gr. Ev., § 570; Ste. Dig., art. 88; Jackson v. Blanshaw, 3 Johns., 292, 295; 3 Am. D., 485; Barr v. Gratz, 4 Wheat., 213, 221; Winn v. Patterson, 9 Peters, 663, 674; 1 Whar. Ev., §§ 194-199, 703, 732.

[37] Ste. Dig., art. 67; Tay. Ev., §§ 1818, 1847; Poole v. Warren, 8 A. & E., 588; Davis v. Spooner, 3 Pick., 284.

[38] 1 Gr. Ev., § 573b; Ste. Dig., art. 67.

between A. and C. may be proved by any competent testimony, without calling the subscribing witnesses ;[39] for the question as to whether or not it was validly executed is not put in issue. (4) Where a different method of proof is allowed by statute. Thus, in all cases where the law provides that a certified copy of any recorded instrument shall be receivable in evidence, the original, when shown to have been duly registered, is admissible to the same extent, without further proof by the subscribing witnesses;[40] and so, when the law declares that any instrument, acknowledged as therein provided, shall be admissible in evidence upon proof of such acknowledgment, this dispenses with the necessity for calling the attesting witnesses in all cases where the conditions required by the statute as prerequisites of the acknowledgment appear from the record to have been complied with.[41] The general tendency of legislation in the United States has been to abolish the rule requiring the attesting witnesses to a document to be called before it can be offered in

[39] Curtis v. Belknap, 6 Wash., 433.

[40] Knox v. Silloway, 1 Fairchild (Me.), 201, 216.

[41] 1 Whar. Ev., § 740; Houghton v. Jones, 1 Wall., 702; Younge v. Guilbeau, 3 Wall., 636.

evidence, excepting that the subscribing witnesses to a will must always be produced, if practicable, before it will be admitted to probate, the peculiar nature of such an instrument rendering the adherence to this method of proof more important than in other cases.

§ 69. The contents of public documents may be proved by copies—Certified copies.—Public documents are permitted to be proven by copies[42] because of the great inconvenience which would result from the frequent removal of the originals, if their production were required every time it became necessary to prove in court any matters therein contained, and also because the originals are so accessible for inspection by all parties interested, as to render it an easy matter to detect any material variations between them and the copies offered in evidence.[43] It is laid down as the law in England that any public document whatever may be proved by an examined copy, that is, a copy proved by oral evidence to have been examined with the original and to correspond therewith,[44] with two

[42] Ste. Dig., art. 71.

[43] Stark. Ev., p. *647; 1 Gr. Ev., § 91.

[44] Ste. Dig., art. 75.

exceptions, viz.: first, where issue has been joined on a plea or replication of *nul tiel record* in some cause in the same court to which the disputed record belongs; and secondly, where a person is indicted for perjury in any affidavit, deposition or answer, or for forgery with respect to any record; in either of which cases the original document must be produced, unless it be shown to have been lost or destroyed, or that the prisoner has got possession of it.[45] It is, however, extremely questionable as to how far this rule would be recognized without qualification in most of the courts of this country.[46] Ample provision has been made both by federal[47] and state legislation for furnishing certified copies of all public documents, duly authenticated under the hands or official seals of the officers having the custody of the originals, or in some other manner provided by law. Such certified copies being generally declared by statute to be evidence equally with the originals, are thereby in effect made primary evidence, and therefore, when it is in the power of the party to procure them, they ex-

[45] Tay. Ev., § 1535.

[46] Cornett v. Williams, 20 Wall., 226, 246.

[47] Rev. Stat. U. S., §§ 882-908.

clude all secondary evidence, excepting, *perhaps,* examined copies.[48] The fact that certified copies are easily obtained has caused them to be so generally used as the means of proving the contents of public documents, that the question as to whether an examined copy, not certified, would be admissible in evidence in cases where such certified copies were obtainable, seems to have been directly passed upon by but few courts of final resort in the United States; but an examined copy, not certified, being only secondary evidence, would seem upon principle to be excluded in such cases by the rule requiring the best attainable evidence to be produced.[49] Public or private acts of congress, or of any state or territorial legislature, may generally, throughout the Union, be read in evidence from any book purporting to have been printed by authority.[50] Judicial proceedings

[48] 1 Whar. Ev., § 90; 2 Elliott Ev., § 1265, etc.

[49] The language of the Supreme Court of the United States in Cornett v. Williams, 20 Wall., 246, strongly favors the view expressed in the text; but see 1 Gr. Ev., § 91, and Abb. Tr. Ev., ch. xxix 1-4, which follow the English rule. The cases on this point will be found in a note to § 1273 of 2 Wigmore on Ev.

[50] 1 Gr. Ev., § 480.

are proved by copies of the record, certified by the officer having the custody of the originals, and authenticated by the seal of the court to which they belong. Such copies are called exemplifications, and in the same state are equivalent to the original record for all purposes, excepting that the original record should be used in the court where the proceedings were had.[51] Exemplifications of the records of courts of sister states of the Union, if certified under the act of congress,[52] or in any other manner allowed by the laws of the state in which they are offered as evidence,[53] are entitled to the same faith and credit as they have by law in the courts of the state from which they are taken.[54] In all such cases, the seal of the court being judicially noticed, no extraneous proof of its genuineness is ever required.[55] The usual mode of authenticating foreign laws and judgments is either by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has

[51] 1 Gr. Ev., §§ 501, 502; Abb. Tr. Ev., ch. xxix 1-4.

[52] Rev. Stat. U. S., § 905.

[53] Abb. Tr. Ev., ch. xxix 15-30; 1 Gr. Ev., § 505.

[54] Id., § 504.

[55] Id., § 503.

compared it with the original, or by the certificate of an officer properly authorized by law to give a copy, which certificate must itself be duly authenticated.[56]

§ 70. Rule requiring primary evidence of the contents of documents modified by statutes making certified copies admissible in evidence. —Whenever special provision has been made by statute for proof of the contents of any document in any other manner than by primary evidence, the rule excluding secondary evidence is of course so far modified as to render it admissible under the circumstances and to the extent so authorized by the statute. Thus, the laws of all the states authorize certain deeds and other instruments to be recorded, and certified copies made from the register to be used in evidence for purposes and under certain circumstances as set forth in such laws. As the terms of these laws vary in the different states, the admissibility in evidence of a certified copy of an instrument made from the register can only be determined in any particular case by a reference to the statute under which it has been recorded.

[56] 1 Gr. Ev., §§ 488, 514; Church v. Hubbard, 2 Cranch, 237.

§ 71. Secondary evidence of documents received in certain cases where party has shown his inability to produce the original in court—Notice to adverse party to produce documents. —Secondary evidence of the contents of documents is received also in certain other cases where the party offering it has first shown his inability to produce the original in court, by proof (1) that the original is of such a nature as not to be easily movable; as in the case of a libel written on a wall, or an inscription upon a tombstone;[57] or (2) that it is in the possession of a person living beyond the jurisdiction of the court;[58] or (3) that it has been destroyed;[59] or (4) that it has been lost, and proper search has been made for it;[60] or (5) that it is in the possession or power of a stranger to the cause, not legally bound to produce it, and who, after having been served with a *subpœna duces tecum,* or having been sworn as a witness, and having admitted

[57] Ste. Dig., art. 71; Tay. Ev., § 438; Whar. Ev., § 82; North Brookfield v. Warren, 16 Gray, 171, 174.

[58] Burton v. Driggs, 20 Wall., 125, 134.

[59] Ste. Dig., art. 71; 1 Gr. Ev., § 558; Riggs v. Tayloe, 9 Wheat., 483.

[60] Ste. Dig., art. 71; 1 Gr. Ev., § 558; Tayloe v. Riggs, 1 Pet., 591, 596; Patterson v. Winn, 5 Pet., 233, 240, 242.

it to be in court, refuses to produce it;[61] or (6) that it is in the possession or control of the adverse party, who refuses to produce it, after having been given such notice to do so as the court regards reasonably sufficient to enable it to be procured.[62] The notice required in the latter case may be given either verbally or in writing, and if in writing, may be served either upon the party himself or his attorney.[63] The object of giving the notice is to enable the party who has the document to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents; and therefore formal notice is unnecessary whenever such party has the document in court,[64] or when the action is founded upon the assumption that it is in his possession or power, and requires its production; as, for example, in trover for a bill of exchange.[65] Nor is any

[61] Ste. Dig., art. 71; 1 Gr. Ev., § 558; 1 Whar. Ev., § 150; Brandt v. Klein, 17 Johns., 35.

[62] Ste. Dig., art. 71; 1 Gr. Ev., § 560; Turner v. Yates, 16 How., 14, 26; Morrison v. Whiteside, 17 Md., 542; 79 Am. D., 661; Scott v. Christianson, 49 Ore., 223, 227; 89 P., 376; 124 Am. St. R., 1041, 1045.

[63] 1 Gr. Ev., § 562.

[64] 1 Whar. Ev., § 155; McPherson v. Rathbone, 7

notice required to be given when the document to be proved is itself a notice.[66] This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason that, if a notice to produce such papers were necessary, the series of notices would become infinite; but why it was subsequently extended by the judges to notices of other kinds is not by any means so clear.[67] The effect of a refusal to produce a document after due notice is not only to enable the other party to prove its contents (if otherwise relevant) by secondary evidence, but it debars the party so refusing from afterwards putting the original in evidence without the consent of his adversary;[68] for were this permitted, he might hold back the

Wend., 216, 219; Rhoads v. Selin, 4 Wash. C. C., 715, 718; 20 Fed. Cas., p. 631.

[65] Ste. Dig., art. 72; 1 Gr. Ev., § 561; Tay. Ev., § 452; Lawson v. Bachman, 81 N. Y., 616; Dana v. Conant, 30 Vt., 246, 257.

[66] Ste. Dig., art. 72; Eagle Bank v. Chapman, 3 Pick., 180, 182; Morrow v. Com., 48 Pa. St., 305, 308.

[67] Tay. Ev., § 450; 2 Elliott Ev., § 1440.

[68] Ste. Dig., art. 139; Tay. Ev., § 1818; Doe v. Hodgson, 12 A. & E., 135; Doon v. Donaher, 113 Mass., 151.

document until he saw whether the secondary proof would be favorable or unfavorable to him, and thus obtain an unfair advantage over his opponent.[69] On the other hand, when a document has been produced upon notice, this fact *primâ facie* obviates the necessity of any proof of its genuineness by the opposite party;[70] and when the latter has inspected it so as to become acquainted with its contents, he is bound, if it be relevant, to give it as evidence, if the party producing it require him to do so;[71] for it would be unjust to allow a party to pry into the affairs of his adversary without at the same time subjecting him to the risk of making whatever he inspects evidence for both sides.[72]

[69] Whar. Ev., § 157; 2 Elliott Ev., § 1435.

[70] Whar. Ev., § 156; Betts v. Badger, 12 John., 223; 7 Am. D., 309; St. John v. Insurance Co., 2 Duer, 419. But see Rhoads v. Selin, 4 Wash. C. C., 715; 20 Fed. Cas., p. 631.

[71] Ste. Dig., art. 138; Whiteside v. Morrison, 17 Md., 452; 79 Am. D., 661; Clark v. Fletcher, 1 Allen, 53, 57; Jordan v. Wilkins, 2 Wash. C. C., 482, 484, n.; 13 Fed. Cas., p. 1112; Wilbers v. Gillespy, 7 S. & R., 10, 14. But see Austin v. Thompson, 45 N. H., 113, 116.

[72] Tay. Ev., § 1817; 2 Elliott Ev., § 1445, etc.

§ 72. Degrees of secondary evidence recognized in America, but not in England.—According to the English decisions, when secondary proof of the contents of a document becomes admissible in any of the cases mentioned in the preceding section, it may be made either by a copy proved to be correct, or by the oral testimony of a witness who has himself seen it,[73] no degrees in secondary evidence being recognized; but many of the courts in the United States have not gone this length;[74] and the American doctrine, as deduced from the various authorities, seems to be, that if, from the nature of the case, it is manifest that a more satisfactory kind of evidence exists, the party will be required to produce it; but where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also show that it was known to the other party in season to have been produced at the trial.[75]

[73] Ste. Dig., art. 71.

[74] Cornett v. Williams, 20 Wall., 226, 246; Harvey v. Williams, 28 Ala., 250; 65 Am. D., 344; United States v. Britton, 2 Mason, 464, 468; 24 Fed. Cas., p. 1239.

[75] 1 Gr. Ev., § 84; note; 1 Whar. Ev., § 90; 2 Wigmore Ev., § 1268.

§ 73. **Secondary evidence may be given of the general result of a collection of documents too numerous to be conveniently examined in court.**—The only remaining case in which secondary evidence can be given of the contents of documents, is where the fact to be proved is the general result of voluminous accounts or of a greater number of documents than can be conveniently examined in court; as that bills of exchange have been, by certain parties, invariably drawn in the same way; or that an examination of a merchant's books and securities showed him to be solvent or insolvent at a particular time. In such cases, when the general result sought to be proved is one capable of being ascertained by calculation, it may be testified to without the production of the documents, by any person who has examined them, and who is skilled in making such examinations.[76] This exception, which is allowed simply as a matter of convenience, and to save the time of the court

[76] Ste. Dig., art. 71; 1 Gr. Ev., § 93; Tay. Ev., § 462; Burton v. Driggs, 20 Wall., 125, 136; Boston & W. R. R. Corp. v. Dana, 1 Gray, 83, 104; Chicago, etc., R. R. Co. v. Wolcott, 141 Ind., 267, 278; 39 N. E., 451; 50 Am. St. R., 320, 327; Blum v. State, 94 Md., 375, 389; 50 A. 567; 56 L. R. A., 322.

from being needlessly taken up by tedious investigations, which can be better and more satisfactorily made by one or two individuals out of court, only applies to cases where the general result to be ascertained is a mere matter of calculation, and does not extend to cases where it is a matter of judgment about which persons equally honest might arrive at different conclusions.

§ 74. Oral testimony may not be given to vary the terms of a written contract.—Whenever the terms of any contract or grant which the parties have put in writing are sought to be proved by a party thereto, or his representative in interest, for the purpose of enforcing, varying or denying any civil right or liability thereunder, such terms may not be proved otherwise than by the writing itself, or by secondary proof of its contents in those cases where such secondary evidence would be admissible under the rules already given.[77] This very important rule of evidence is nothing more than another application of the

[77] Ste. Dig., arts. 90, 92; Cornwall, etc., R. R.'s Appeal, 125 Pa. St., 232; 17 A., 427; 11 Am. St. R., 889; Barreda v. Silsbee, 21 How., 146, 169; McMaster v. Insurance Co., 55 N. Y., 222; 14 Am. R., 239.

principle requiring all facts to be proved by the best kind of evidence attainable, the law very sensibly assuming that whenever the parties to a contract have deliberately put it in writing, such writing is, as between them, better evidence of what they mutually agreed to, than the mere recollections of any person who was present when such agreement was made, whether a party to it or not.[78] And the same reasoning which excludes oral evidence as a substitute for the written statement of the terms of an agreement, equally excludes it when sought to be introduced for the purpose of contradicting, altering, adding to or varying the terms so reduced to writing; for this would be to practically supersede the written by oral evidence.[79] But the rule making the written contract the exclusive evidence of what the parties agreed to when they executed it, does not by any means prevent them from showing such agreement to have been procured by fraud or intimidation, or that by reason of illegality, failure or want of consideration, want of due execution, want

[78] 1 Gr. Ev., § 87; 1 Whar. Ev., § 60.

[79] 1 Gr. Ev., § 275; Tay. Ev., § 1132; 2 Whar. Ev., § 1014; Forsythe v. Kimball, 91 U. S., 291; Seitz v. Brewers' Refrig. Co., 141 U. S., 510, 517.

of capacity on the part of any of the contracting parties, mistake in fact or law, or any other matter, it is invalid; for the purpose and effect of such evidence is not to contradict or vary the terms of the writing, but to disprove its legal existence or rebut its operations.[80] And so, also, it may be shown by oral evidence that there was a separate oral agreement between the same parties, constituting a condition precedent to the attaching of any obligation under any written contract, grant or disposition of property which may be in question, and that such condition precedent was not performed; for this is in effect not to vary, or give inferior evidence of the terms of the writing, but to defeat it altogether by showing that the parties never intended its terms to be operative at all under the existing state of facts;[81] thus, where A. contracted

[80] Ste. Dig., art. 90; 1 Gr. Ev., § 284; 1 Starkie Ev., p. *671; 2 Whar. Ev., §§ 930-935; Martin v. Clark, 8 R. I., 389; 5 Am. R., 586; Union Mut. Ins. Co. v. Wilkinson, 13 Wall., 222, 231; Fire Ins. Asso. v. Wickham, 141 U. S., 564, 577; 1 Ell. Ev., § 573.

[81] Ste. Dig., art. 90; 2 Whar. Ev., § 927; Tay. Ev., § 1038; Pym v. Campbell, 6 E. & B., 370; Ware v. Allen, 128 U. S., 590; Rearick v. Swinheart, 111 Pa. St., 233; 51 Am. D., 540; Burke v. Dulany, 153 U. S., 228; 1 Ell. Ev., § 575.

in writing to assign to B. the lease of a farm which the former held as tenant of C., it being verbally agreed between them that this contract was conditional upon the assent of the landlord thereto, and B. sued A. for not assigning the lease in pursuance of such contract, A. was allowed to prove the condition as to C.'s consent, and the fact that C. did not consent.[82] Neither does this rule exclude oral evidence of the fact that a deed or contract has been wrongly dated; for the date is ordinarily no part of the terms agreed on, but a mere statement of the time when they went into effect, which, although generally presumed to be *primâ facie* correct, may, like other recitals of formal matter which do not involve a contract, be contradicted by extrinsic parol evidence.[83]

§ 75. This rule only extends to writings intended by the parties as a binding statement of their transactions.—This rule only extends to such writings as appear to have been intended by the parties as a formal and binding

[82] Wallis v. Littell, 11 C. B. (N. S.), 369.

[83] Ste. Dig., art. 90; 2 Whar. Ev., §§ 976-979, 1039; Tay. Ev., § 1150; Raffell v. Raffell, L. R., 1 P. & D., 139; Deakin v. Hollis, Adm'r, 7 G. & J., 311, 316; Stockham v. Stockham, 32 Md., 196.

statement of the transaction between them, and which have been so accepted by both sides ; and hence oral evidence of the terms of a verbal contract is not excluded by the fact that a memorandum of it was made in writing at the time, unless such memorandum was intended to have legal effect as a contract or other disposition of property;[84] thus, if A. sells a horse to B. with a verbal warranty of his soundness, and gives him a paper in these words, "Bought of A. a horse for 7*l.* 2*s.* 6*d.* A.," this does not prevent B. from afterwards proving the verbal warranty;[85] for a simple receipt is ordinarily not intended as a statement of the terms of a contract, but is merely an acknowledgement of payment or delivery, which, like other admissions, though *primâ facie* evidence of the fact, may generally be contradicted by oral testimony; but where the receipt also contains a contract to do something in relation to the thing delivered, then it becomes the best evidence of the contract between the parties, and, standing upon the footing of other contracts in writing, cannot be contradicted or

[84] Ste. Dig., art. 90; Tay. Ev., § 1134; 2 Whar. Ev., §§ 920, 926; 1 Elliott Ev., § 573.

[85] Allen v. Prink, 4 M. & W., 140.

varied by parol.[86] And even in those cases where the parties have made a formal agreement in writing with the intention of being bound by its terms, if, from the circumstances of the case, the court infers that they did not intend the writing to be a complete and final statement of the whole transaction between them, evidence may be given of any separate agreement as to any matter on which such writing is silent and which is not inconsistent with its terms;[87] for this is neither contradicting nor varying the terms of the writing, but only proving a contemporaneous parol agreement collateral to and not inconsistent with it. And upon the same principle, evidence may be given of any usage or custom affecting the parties to any written contract, by which incidents not expressly mentioned

[86] 1 Gr. Ev., § 305; Tay. Ev., § 1134; Fire Ins. Assoc. v. Witham, 141 U. S., 564, 581; Henry v. Henry, 11 Ind., 236; 71 Am. D., 354; Stapleton v. King, 33 Iowa, 28; 11 Am. R., 109.

[87] Ste. Dig., art. 90; Tay. Ev., § 1038; Abb. Tr. Ev., ch. xvi 8; Lindley v. Lacey, 17 C. B. (N. S.), 578; Morgan v. Griffith, L. R., 6 Exc., 70; Chapin v. Dobson, 78 N. Y., 74; 34 Am. R., 512; Cobb v. Wallace, 5 Cold., 539; 98 Am. D., 435; Durkin v. Cobleigh, 156 Mass., 108; 30 N. E., 474; 32 Am. St. R., 436; 17 L. R. A., 270.

in it are annexed to all contracts of that description as implied therein; unless the annexing of such incident would be repugnant to or inconsistent with the express terms or legal effect of the writing itself.[88] Thus, to a shipping contract it is admissible to annex as an incident, by proof of usage, the customary method of engaging and paying crews;[89] and though a promissory note is silent as to any days of grace, parol evidence of the known and established usage of the country or place where it is payable, is admissible to show on what day the grace expired.[90] Such evidence is admitted upon the "presumption that the parties did not intend to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages,"[91] which differ from the parol con-

[88] Ste. Dig., art. 90; 1 Gr. Ev., § 294; Tay. Ev., §§ 1168-1170; Bliven v. N. E. Screw Co., 23 How., 420, 431; Thompson v. Riggs, 5 Wall., 663, 679; Moran v. Prather, 23 Wall., 492, 503; Smith v. Clews, 114 N. Y., 190; 21 N. E., 160; 11 Am. St. R., 627; 4 L. R. A., 392.

[89] Eldredge v. Smith, 13 Allen, 140.

[90] Renner v. Bank, 9 Wheat., 581.

[91] Hutton v. Warren, 1 M. & W., 466, per Parke, B., p. 475.

temporaneous agreements as to collateral matters which we have just been considering, only in that they attach by implication instead of by express stipulation.[92] But such usage must be consistent with the rules of law, for otherwise the parties will not be presumed to have contracted with reference to it ; and it must also be consistent with the terms of the written contract, for it is always optional to the parties to exclude the usage, if they think fit, and to frame their contract so as to be repugnant to its operation.[93] Nor does the rule under consideration exclude proof of any distinct subsequent oral agreement to rescind or modify any such written contract, grant or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise.[94] For this, it will be observed, is not to substitute parol proof for the written evidence of the terms of the original contract, but to show that the parties have since modified those terms, it being a well

[92] 2 Whar. Ev., § 969; 1 Elliott Ev., § 607.

[93] Anson on Contracts, 238; Oelrichs v. Ford, 23 How., 49.

[94] Ste. Dig., art. 90; Cummings v. Arnold, 3 Metc., 486; 37 Am. D., 155; Bannon v. Aultman, 80 Wis., 307; 21 N. W., 967; 27 Am. St. R., 37.

recognized principle of common law, that any obligation by writing which is not under seal may, *in the absence of statutory interference,* be either totally or partially disolved or modified before breach by a subsequent oral agreement.[95] In cases where by reason of the original contract being under seal, or on account of the provisions of the statute of frauds or other express legislation, such subsequent oral agreement would be invalid at law, it could not, of course, be proved in evidence.

§ 76. And to controversies between the parties to the instrument and those claiming under them.—It must be observed that this rule only applies to controversies between the parties to the written instrument and those claiming under them;[96] for the rule being founded upon the theory that, because the parties have made such writing the authentic

[95] Tay. Ev., § 1142; Whar. Ev., §§ 1017, 1018; Goss v. Lord Nugent, 2 B. & Ad., 58, 65, 66.

[96] Ste. Dig., art. 92; 1 Gr. Ev., § 279; Tay. Ev., § 1149; Whar. Ev., § 923; Barreda v. Silsbee, 21 How., 146, 169; McMasters v. Insurance Co., 55 N. Y., 222; 14 Am. R., 239; Coleman v. Pike Co., 83 Ala., 236; 3 So., 755; 3 Am. St. R., 746; Bruce v. Roper Lumber Co., 87 Va., 381; 13 S. E. 153; 24 Am. St. R., 657; 1 Elliott Ev., § 572.

memorial of their contract, it must therefore be taken as between them to speak the truth, and the whole truth, in relation to its subject-matter, there is no reason why strangers who have not come into the agreement should be bound by it, and consequently, when their rights are concerned, they are at liberty to show that the written instrument does not disclose the very truth of the matter. And if they be thus at liberty when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this conventional law, or neither.[97] Thus, the existence and terms of a partnership, though formed by a written contract, may be proved by parol evidence, excepting in controversies between the alleged partners and their representatives;[98] and so, also, the fact of an agency having been created by a written authority does not prevent third parties from proving it by parol, excepting in cases where a writing is essential to its validity. And even in cases where the contro-

[97] Reynolds v. Magness, 2 Ired., 26, 30.

[98] Abb. Tr. Ev., ch. ix 2, etc.; McGregor v. Cleveland, 5 Wend., 475; Gilbert v. Whedden, 20 Me., 368; Dutton v. Woodman, 9 Cush., 255; 57 Am. D., 46.

versy is between the parties to the written contract or their representatives, the rule is only applicable where some civil right or liability dependent upon its terms is in question; for the binding effect of a contract only extends to the civil rights and liabilities of the parties thereto, and of those claiming through them.[99] Hence, when A. prosecutes B. criminally for obtaining money from him under false pretenses as a premium for entering into partnership with him, A. is not prevented from testifying that he was induced to pay 200*l.* and enter the partnership by the false representation of B. that he had obtained an appointment as emigration agent at a salary of 600*l.* per annum, notwithstanding the fact that the deed of partnership executed by A. and B., which was offered in evidence, recited the 200*l.* as the consideration for the partnership, and made no mention whatever of the emigration agency.[100]

§ 77. How far the meaning of a writing may be explained by oral testimony.—Although, as we have already seen, parol evidence is inadmissible, as between the parties, to contradict, add to or vary the terms of any agree-

[99] Ste. Dig., art. 92: 1 Elliott Ev., § 577.
[100] Reg. v. Adamson, 2 Moody, 286.

ment or grant which they have reduced to writing, yet, within certain limits, parol and other extrinsic evidence is admissible *to explain the meaning* which the parties intended to express by the terms employed, and to identify the persons and things thereby referred to.[101] These limits are, first, that where the words used have a plain legal meaning, it is not permissible to introduce evidence that they were intended to be used in a peculiar sense, unless the context or the circumstances under which they were used clearly show that the parties did not mean them to be understood in their ordinary legal acceptation;[102] since persons must be presumed to have intended the natural and proper meaning of the words used by them, unless the contrary plainly appear; and secondly, if the words of a document are so ambiguous as to be unmeaning in themselves, no evidence can be given to show what its

[101] Tay. Ev., § 1158; 1 Elliott Ev., § 597.

[102] Tay. Ev., § 1165; Ste. Dig., art. 91 (2), (5); 1 Gr. Ev., § 295; 2 Whar. Ev., §§ 924, 940; Moran v. Prather, 23 Wall., 492, 501; Wilmering v. McGaughey, 30 Iowa, 205; 6 Am. R., 673, note; Armstrong v. Lake Champlain, etc., Co., 147 N. Y., 495; 42 N. E. 186; 47 Am. St. R., 683.

author intended to say;[103] for this would be adding to the terms of the document instead of explaining them. Within these limits, however, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical and provincial expressions, of abbreviations and of common words, which from the context appear to have been used in a peculiar sense;[104] for this neither adds to nor varies the terms actually used, but merely enables the court to discover the meaning intended to be conveyed by them.[105] And so, also, in order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it;[106] for to enable the judge to discover the in-

[103] Ste. Dig., art. 91 (3); Peisch v. Dickson, 1 Mason, 9; 19 Fed. Cas., p. 123; Newcome v. Kline, 11 G. & J., 457; 37 Am. D., 74.

[104] Ste. Dig., art. 91 (2); Tay. Ev., §§ 1159-1164; Stoops v. Smith, 100 Mass., 63, 66; 1 Am. R., 857; Thorington v. Smith, 8 Wall., 1, 12.

[105] Tay. Ev., § 1158; 1 Elliott Ev., 605.

[106] Ste. Dig., art. 91 (4); Reed v. Insurance Co., 95 U. S., 23, 50; Maryland v. B. & O. R. R. Co., 22 Wall., 105, 113.

tention of the writer as evidenced by the words he has used, he must, as far as possible, put himself in the writer's place, and then see how the terms of the instrument affect the subject-matter.[107] So that whenever, in a written instrument, the description of the person or thing intended *is applicable with legal certainty* to each of several objects, not only such extrinsic facts, but even proof of the declarations of the author, become admissible to establish which of such subjects he meant to refer to;[108] but in cases where, by reason of inaccuracy in the description of a person or thing, *it is partly applicable and partly inapplicable to each of several subjects,* although such extrinsic facts may be proved to show which of them was meant, evidence of the author's declaration of intention is not admissible for this purpose.[109] So, also, the same rule as to extrinsic facts applies in cases where, the description being

[107] Tay. Ev., §§ 1082, 1194; 1 Elliott Ev., § 602.

[108] Tay. Ev., § 1226; Wigr., Wills, 160; Ste. Dig., art. 91 (8); Mech. Bank of Alexandria v. Bank of Columbia, 5 Wheat., 326, 337; Miller v. Stevenson, 100 Mass., 518; 1 Am. R., 139.

[109] Tay. Ev., § 1226; Ste. Dig., art. 91 (7); 2 Whar. Ev., § 1001; Doe v. Hiscocks, 5 M. & W., 33; Stringer v. Gardiner, 27 Beav., 35.

partly correct and partly incorrect, the correct part is sufficient to identify the subject intended, *while the incorrect part is inapplicable to any subject,* in which cases the instrument will be rendered operative by rejecting the erroneous statement.[110] And finally, in cases where courts of equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations or of collateral facts, showing the intention to be otherwise;[111] for this is not to contradict the language used by the parties, but simply to do away with an artificial presumption of law with regard to it.

[110] Tay. Ev., § 1226; Wigr., Wills, 67, 70; 2 Whar. Ev., § 945; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674; 14 Am. R., 538; Whitcomb v. Roderman, 156 Ill., 116; 40 N. E., 553; 47 Am. St. R., 181; 28 L. R. A., 149.

[111] Tay. Ev., § 1228; Ste. Dig., art. 91 (9); 2 Whar. Ev., §§ 973, 974; Hurst v. Beach, 5 Madd., 351, 360; Hall v. Hill, 1 Dru. & War., 94, 111-133.

PART III.

ON THE PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER I.

BURDEN OF PROOF.

§ 78. Burden of proof lies on the party substantially asserting the affirmative of the issue. —Having considered the rules by which are determined the relevancy of facts and the kind of proof by which they may be established, we now come to those regulating the parties by whom such proof must be produced, the methods of its production, and its legal effect when produced. And first, as to the parties, it may be laid down as the general rule, that *the burden of proof lies on the party who substantially asserts the affirmative of the issue,*[1] upon the principle that it is

[1] 1 Gr. Ev., § 74; Tay. Ev., § 364; 1 Whar. Ev., §§ 353, 356; Costigan v. Rice, 2 Denio, 609, 616; 43 Am. D., 758; 1 Elliott Ev., § 132.

but reasonable and just that the suitor who relies upon the existence of a fact should be called upon to prove his own case.[2] In determining the question as to which party asserts the affirmative, regard is had to the substance and effect of the issue, and not merely to its form.[3] In other words, the question is *which party makes the averment*, even though it be a negative one, as a part of his case. An allegation in the negative must not be confounded with the mere denial or traverse of an affirmative allegation;[4] as for instance, where, in an action upon a covenant by the defendant to put certain repairs upon a messuage which he held as tenant, the plaintiff alleged that the defendant did *not* repair, and the defendant traversed by alleging that he *did* repair, the burden of proof was held to be upon the plaintiff, notwithstanding that his averment was negative in form.[5] The best

[2] Tay. Ev., § 364; 1 Elliott Ev., § 132.

[3] 1 Gr. Ev., § 74; Tay. Ev., § 364; 1 Elliott Ev., § 141.

[4] Best on Ev., § 271; 1 Elliott Ev., § 141; Bouldin v. McIntire, 119 Ind., 574; 21 N. E., 445; 12 Am. St. R., 453; Gt. West. R. R. Co. v. Bacon, 30 Ill., 347; 83 Am. D., 199.

[5] Best on Ev., § 272; 1 Elliott Ev., § 141; Soward v. Leggatt, 7 C. & P., 613.

tests for ascertaining on whom the burden of proof lies are, first, to consider who would succeed if no evidence were given on either side; and secondly, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the *onus* must lie on whichever party would fail if either of these steps were pursued.[6]

§ 79. Except where a disputable presumption of law exists in his favor.—To this rule, throwing the burden of proof upon the party who substantially asserts the affirmative, there are two exceptions. The first is in cases where *a disputable presumption of law* exists in favor of the party alleging the affirmative; for here, if no evidence were given on either side, the latter must succeed by virtue of this presumption, and consequently the burden of proof is shifted from him to his opponent.[7] These presumptions are very numerous, and most of them so closely connected with the various branches of substantive law to which they relate as to be al-

[6] Tay. Ev., § 365; 1 Whar. Ev., § 357; app. Gambrill v. Schooley, 95 Md., 260, 271; 52 A., 600; 63 L. R. A., 427; 1 Elliott Ev., § 132.

[7] Tay. Ev., §§ 367-370.

most unintelligible except in connection with them. For this reason any attempt to enumerate them would be entirely out of place in the present work, and therefore only a few of those that are of more general application, as well as of frequent occurrence, will be here noticed.

The first of these is the presumption of innocence, by which the burden of proof is always (unless there be some express statutory provision to the contrary) thrown upon the party who either directly or indirectly avers that any other person has been guilty of any crime or wrongful act, even though such guilt can only be established by proving a negative.[8] To convict the accused in a criminal proceeding, his guilt must be proved affirmatively beyond reasonable doubt;[8a] but when the question whether or not a person has committed a crime arises collaterally in a civil cause, the same strictness of proof is not required, and it is to be determined by the preponderance of evidence, although even in such cases the burden of proving the guilt

[8] 1 Gr. Ev., § 35; Tay. Ev., § 113.

[8a] For definition of reasonable doubt see Holt v. United States, 218 U. S., 245, 253; 3 Gr. Ev., § 29.

affirmatively is still imposed upon the party who alleges it.[9]

A wife who acts in company with her husband in the commission of a felony other than treason or homicide is presumed to act under his coercion, and consequently without guilty intent.[10]

Every sane man is presumed to contemplate the natural and probable consequences of his own intentional acts until the contrary plainly appears; that the intent to murder is to be presumed *primâ facie* from the de-

[9] To this effect is the weight of American authority. 2 Whar. Ev., §§ 1244-1246; Abb. Tr. Ev., ch. xxvi, 31; Scott v. Insurance Co., 1 Dill. C. C., 105, 107; 21 Fed. Cas., No., 12,500, p. 833; Welch v. Juggenheimer, 56 Iowa, 11; 8 N. W., 673; 41 Am. R., 76; Seybolt v. N. Y., L. E. & W. R. R. Co., 95 N. Y., 562; 47 Am. R., 75. For the English rule, which has been followed in several of the states, that crime must be proved beyond a reasonable doubt even in civil cases, see Thurtell v. Beaumont, 1 Bing., 339; also Kane v. Insurance Co., 38 N. J. L., 441-446; Barton v. Thompson, 46 Iowa, 30; 26 Am. R., 131; Ste. Dig., art. 94; Tay. Ev., § 112.

[10] 1 Gr. Ev., § 28; 3 id., § 7; Tay. Ev., § 190; 2 Whar. Ev., § 1256; Com. v. Neal, 10 Mass., 152; 6 Am. D., 105; Nolan v. Trayhern, 49 Md., 460; 33 Am. D., 277; 3 Elliott Ev., § 2253.

liberate use of a deadly weapon; and the deliberate publication of calumny which the publisher had no reason to believe to be true raises the presumption of malice.[11]

It is another general presumption, that things once proved to have existed in a particular state continue to exist in that state until the contrary be established by evidence either direct or presumptive.[12] And, therefore, where a person is once shown to have been living, the law, in absence of proof that he has not been heard of within the last seven years, will, in general, presume that he is still alive, unless such a period had elapsed as would make his age considerably exceed the

[11] 1 Gr. Ev., §§ 18, 34; Tay. Ev., §§ 80-83; 2 Whar. Ev., §§ 1258, 1261; State v. Levelle, 34 S. C., 120; 13 S. E., 319; 27 Am. St. R., 799; Childers v. San Jose, etc., Co., 105 Cal., 284; 38 P., 903; 45 Am. St. R., 40; 3 Elliott Ev., § 2451.

[12] Best on Ev., § 405; Whar. Ev., § 1284; 1 Gr. Ev., § 41; Tay. Ev., §§ 196, 197; Bradner, Ev., § 438; 1 Elliott on Ev., §§ 109-110; City of Cohoes v. Del. & H. Canal, 134 N. Y., 397; 31 N. E., 887; Re Huss, 126 N. Y., 537; 27 N. E., 784; Ellis v. State, 138 Wisc., 513; 120 N. W., 1110; 131 Am. St. R., 1022; State v. Chittenden, 127 Wisc., 468; 107 N. W., 500, 511; 3 L. N. S., 1115.

ordinary duration of human life.[13] But when a person is shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, he is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.[14]

Every man is presumed to be sane in the absence of evidence to the contrary.[15]

And where a party sued upon a written contract pleads infancy, he will be presumed to be of full age, in the absence of proof to support his plea affirmatively.[16] Whenever

[13] Tay. Ev., § 198; 2 Whar. Ev., § 1274; Hammond's Lessee v. Inloes, 4 Md., 138, 172-75; O'Gara v. Eisenlohr, 38 N. Y., 296; Lowe v. Foulke, 103 Ill., 58; Young v. Shulenberg, 165 N. Y., 385, 389; 59 N. E., 135; 80 Am. St. R., 730, 733.

[14] Ste. Dig., art. 99; Tay. Ev., § 200; 1 Gr. Ev., § 41; 2 Whar. Ev., § 1276; Davie v. Briggs, 97 U. S., 628, 633; Sprigg v. Moale, 28 Md., 497; 92 Am. D., 698; Dowd v. Watson, 105 N. C., 476; 10 S. E., 1101; 18 Am. St. R., 920.

[15] Tay. Ev., § 370; 1 Gr. Ev., § 42; 2 Whar. Ev., § 1252; O'Connell v. People, 87 N. Y., 377; 41 Am. R., 379; Hiett v. Shull, 36 W. Va., 563; 15 S. E., 146.

[16] 1 Gr. Ev., § 81; Abb. Tr. Ev., ch. lix, 20; 1

any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.[17] Until the contrary appears the law presumes that the same name identifies the same person since names are used for the very purpose of identifying the individual to whom they are attached and therefore the burden of proof is upon the defendant to show that he is not the person of the same name against whom a *cause of action* has been established by the evidence;[18]

Star Ev., § 591; Borthwick v. Carruthers, 1 T. R., 648; Hartley v. Wharton, 11 A. & E., 934; R. v. Turner, 5 M. & Sel., 206.

[17] Ste. Dig., art. 101; Tay. Ev., § 124; 1 Gr. Ev., § 20; 2 Whar. Ev., §§ 1302-1309; Applegarth v. Lexington, etc., Mfg. Co., 117 U. S., 255, 264; Adams v. Cowles, 95 Mo., 501; 8 S. W., 711; 6 Am. St. R., 74; Hogue v. Corbit, 156 Ill., 540; 41 N. E., 219; 47 Am. St. R., 232; Berrenberg v. City of Boston, 137 Mass., 231; 50 Am. R., 296, and note; 1 Elliott Ev., § 99.

[18] Lawson Presump. Ev., Ch. 12, Rule 57. Ruppert v. Penner, 35 Neb., 587; 53 N. W., 598; 17 L. R. A., 824; Ritcher v. Carpenter, 2 Wash., 512; 28 P., 380; 26 Am. St. R., 877; Flournoy v. Warden, 17 Mo., 435. But as to presumption in criminal prosecution see State v John Smith, 129 Iowa, 709;

and the fact that the name is differently spelled makes no difference if the pronunciation of the name is indistinguishable in ordinary conversation.[19] There are also certain general disputable presumptions as to documents; as that any document which has been duly proved, and bears a date, was executed on that date; and where several documents so proved bear date on the same day, that they were executed in the order necessary to effect the object for which they were executed, unless the circumstances are such that collusion as to the date might be practiced, and would, if practiced, injure any person, or defeat the object of any law.[20]

Any document purporting to be a deed, which appears to have been duly signed and

106 N. W., 187; 4 L. N. S., 539, with case note showing some conflict of authorities.

[19] Barnet v. People, 18 Ills., 52; 65 Am. D., 697, for extended note on doctrine of *idem sonans*, see 100 Am. St. R., 322; note to Thornelly v. Prentice, 121 Iowa, 89; A. J. Veasey v. Brigman, 93 Ala., 548; 9 So., 728; 13 L. R. A., 541 and note.

[20] Ste. Dig., art. 85; 2 Whar. Ev., § 1312; Tay. Ev., § 169; Knowlton v. Culver, 2 Pinney, 243; 52 Am. D., 156; Anderson v. Weston, 6 Bing. N. C., 302; Sinclair v. Bagalley, 4 M. & W., 318; Butler v. Mountgarret, 7 H. L. Cas., 633, 646

attested, is presumed to have been duly sealed and delivered, although no impression of a seal appears thereon.[21]

So, also all documents purporting or proved to be thirty years old, when unblemished by alterations and produced from such custody as the judge considers natural or proper under the circumstances, are presumed to be genuine, and to have been executed and attested by the persons by whom they purport to have been executed.[22]

Alterations and interlineations appearing on the face of a document will, generally speaking, be presumed to have been made contemporaneously with the execution of the instrument; but any ground of suspicion upon the face of the instrument, or arising from the circumstances of the case, is sufficient to rebut this presumption, and throws upon the party offering the document in evidence the burden of showing how, when, by

[21] Ste. Dig., art. 87; 2 Whar. Ev., § 1314; Ward v. Lewis, 4 Pick., 518.

[22] 1 Gr. Ev., §§ 21, 142, 143, 144; Tay. Ev., §§ 658, 667; 1 Whar. Ev., §§ 194, 703, 732; 2 id., § 1359; Jackson v. Blanshaw, 3 Johns., 292; 3 Am. D., 480; Barr v. Gratz, 4 Wheat., 213, 221; Winn v. Patterson, 9 Peters, 663, 674; 2 Elliott Ev., § 1319.

whom, and with what intent, such alteration was made.[23]

There is also a disputable presumption that any person who is shown to have acted in an official capacity was duly appointed and qualified to do so at that time; and this applies also to officers of corporations.[24]

§ 80. Or the subject-matter of his allegation lies peculiarly within the knowledge of the other party.—The second exception to the rule throwing the burden of proof upon the party who substantially asserts the affirmative is, that in cases where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative

[23] 1 Gr. Ev., §§ 564-568; 1 Whar. Ev., § 629; Abb. Tr. Ev., ch. v, 87, ch. xxvi, 31, ch. xlviii, 7; Letcher v. Bates, 6 J. J. Marsh., 524; 22 Am. D., 92; Collins v. Ball, 82 Tex., 259; 17 S. W., 614; 27 Am. St. R., 879. See Wilson v. Hayes, 40 Minn., 531; 42 N. W., 467; 4 L. R. A., 196; 12 Am. St. R., 754; Nat. Ulster Co. Bank v. Madden, 114 N. Y., 280; 21 N. E., 408; 11 Am. St. R., 633, and note.

[24] Ste. Dig., art. 90; Tay. Ev., § 171; 2 Whar. Ev., § 1315; Bank of U. S. v. Danddridge, 12 Wheat., 64, 70; Com. v. Kane, 108 Mass., 423; 11 Am. R., 373; 1 Elliott Ev., § 106.

or negative character.[25] Thus in proceedings, whether civil or criminal, instituted against persons for doing acts which they are not permitted to do without a special license or authority, as for selling liquors, exercising a trade or profession, or the like, the *onus* of proving such license or authority lies upon the defendant.[26] Although this rule is laid down generally in most of the text-books, and has frequently been recognized in opinions delivered from the bench, yet the authorities are by no means agreed as to the extent to which it is to be carried.[27] Alderson, B., held[28] that the rule only applies to the *weight* of the evidence, and that there should always be some evidence to start it, in order to cast the *onus* on the other side, and such also appears to have been the view taken by Chief Justice Shaw of Massachusetts;[29] but some

[25] Tay. Ev., § 376; 1 Whar. Ev., § 367; Great W. R. R. Co. v. Bacon, 30 Ill., 347; 83 Am. D., 199; City of Fort Smith v. Dodson, 51 Ark., 447; 11 S. W., 687; 4 L. R. A., 252; 14 Am. St. R., 620.

[26] Tay. Ev., § 377; 1 Gr. Ev., § 79; 1 Whar. Ev., § 368; United States v. Haywood, 2 Gall., 485; 26 Fed. Cas., pp. 240, 245.

[27] Best Ev., §§ 274, 275; 4 Elliott Ev., § 3170.

[28] Elkin v. Janson, 13 M. & W., 655, 662.

[29] Comm. v. Thurlow, 24 Pick., 374.

of the cases in the books seem to go further.[30] In many of them, however, the burden of proof is more or less affected by express statutory provisions; and perhaps the most accurate statement of the rule, as far as established by adjudicated cases at common law, is to be found in Starkie,[31] who says that, upon general principles, a party is relieved "from proof of the negative of any matter where the existence of the affirmative is essential to exempt or discharge the adversary from some duty or liability proved upon him."[32] Under this rule also when an in-

[30] United States v. Haywood, *supra.*

[31] 1 Starkie, Ev., p. *589.

[32] This rule being founded upon considerations of public convenience and common sense, there is no good reason why it should not be made by statute to apply to cases where the plaintiff is obliged, as in foreign attachments, to aver and prove that his adversary is a non-resident of the state. This might be done by declaring that in such cases the testimony of the plaintiff that he had made diligent inquiry as to the residence of the defendant from the persons most likely to know about it, and that from the best and most reliable information so obtained he verily believed him to be a non-resident of the state, should be competent evidence from which such non-residence might be inferred, in the absence of any proof

jury happens to a passenger, while in transit, by a common carrier or when property is lost or damaged during its transportation, the burden of proof is imposed upon the carrier to show that such injury, loss or damage was not caused by any negligence on its part, even in cases where the contract of shipment expressly limits the carrier's liability to losses arising from its negligence.[33]

§ 81. Burden of proof in particular classes of cases.—Having shown the general nature of the burden of proof and upon whom it is imposed, we will next consider the character of evidence by which it must be sustained in the various classes of cases most frequently

to the contrary. The absence of such provision oftentimes renders it impossible for a plaintiff to prove by legal evidence the non-residence of his debtor, because he does not know the precise place where he lives, although there may be abundant hearsay evidence which establishes to a moral certainty the fact that he has left the state. Under such circumstances, throwing upon the defendant the burden of proving his residence would certainly tend to promote the ends of justice.

[33] Phila. W. & B. R. R. v. Anderson, 72 Md., 519; 20 A., 2; 8 L. R. A., 678; 20 Am. St. R., 483 and note. Mitchell v. Carolina R. R., 124 N. C., 574; 32 So., 671; 44 L. R. A., 515.

arising in practice. This includes (1) Jurisdictional facts. (2) The authority of plaintiffs undertaking to sue, and the liability of defendants who are sued in special characters such as partners, executors, administrators, trustees, receivers, assignees, heirs, devisees, legatees or distributors, or as corporations or companies. (3) The contract and the breach of it constituting the ground of an action *ex contractu*. (4) The legal duty and the breach of it upon which an action *ex delicto* is founded. (5) The quantity of evidence required in civil and criminal cases.

§ 82. Jurisdictional facts.—The burden is always imposed upon the plaintiff of establishing the existence of the facts necessary to give the tribunal before which the case is tried, jurisdiction to decide it. The importance of establishing these facts is two-fold: first, because a judgment by a court without jurisdiction is a nullity, and it must therefore be presumed that no court will render judgment until satisfied it has jurisdiction to do so. And secondly, because a judgment so rendered without jurisdiction cannot be afterwards enforced. Jurisdiction cannot be conferred upon a Court by consent of the parties although in the trial of cases strictly

inter partes the facts which would confer jurisdiction may, if alleged by the plaintiff, ordinarily be established by proof of the admissions express or implied of the defendant. The usual test to determine whether a judgment rendered was within the jurisdiction of the Court is an inspection of the record, but there is this distinction betwen the records of courts of general jurisdiction—which are those having to take all ordinary judicial action in any case brought before a court in any common law mode or in any mode prescribed by statutes in lieu and as the equivalent of the common law mode—and those of courts exercising a special limited power, derived solely from and exercisable only according to statutes, to take judicial action through such modes of procedure as the statute authorizes and prescribes. Whenever a court of general jurisdiction has rendered a judgment, it will always be conclusively presumed that all the facts necessary to give it jurisdiction in the premises were established before it, unless such presumption is directly contradicted by the record itself, or by extraneous proof of fraud.[34] But where a court exercises a spe-

[34] Voorhees v. Bank U. S., 10 Pet., 449, 469; Grignon's heirs v. Astor, 2 How., 319, 341; Arroyo

cial or limited jurisdiction under a special statute prescribing the occasion and mode of its exercise, no such presumption arises, but on the contrary, the proceedings must be fully set forth in the record and they will be held illegal unless it appears therefrom affirmatively that all the facts requisite to confer upon the court the jurisdiction it exercised were duly averred and proved.[35] It must be remembered that all jurisdictional facts necessary to entitle a plaintiff to the benefit of a special or statutory proceeding must be proved by competent legal evidence in court before he can obtain a judgment in such proceeding. *Ex parte* affidavits required as a preliminary to the issue of process are not legal proof that the facts alleged in such affidavits are true and the proof of the truth of such facts is as much a judicial require-

Ditch Co. v. Superior Court, 92 Cal., 47; 28 P., 54; Am. St. R., 91.

[35] Thatcher v. Powell, 6 Wheat., 119, 127; Hall v. Howd, 10 Conn., 514; 27 Am. D., 696; Tracey v. Roberts, 88 Me., 310, 316; 34 A., 68; 51 Am. St. R., 394, 396; Warren v. Union Bank Rochester, 157 N. Y., 259, 276; 51 N. E., 1036; 68 Am. St. R., 777; 43 L. R. A., 256; Williamette Real Est. Co. v. Hendrix, 28 Or., 485, 494; 42 P., 514; 52 Am. St. R., 800.

ment as is the filing of the affidavits, so that the plaintiff cannot succeed if he fails to produce such proof at the trial. While in suits strictly *inter partes* jurisdictional facts may generally be proved by mere admissions made in the pleadings or otherwise, or even by the failure of the defendant to deny such facts when alleged by the plaintiff, this is not the case in proceedings *in rem* where the purpose is to condemn property seized, or determine the status of a person or thing, for it would be most unjust that the rights of persons not duly summoned to appear before the court should be injuriously affected by the mere statements of others not made under oath or subjected to the test of cross examination. Hence in cases of foreign attachment the burden is laid upon the plaintiff to prove by competent evidence at the trial the non residence of the defendant alleged in his affidavit as the ground for the issue of the writ of attachment,[36] and so also in proceedings for the condemnation of property seized the prosecutor must furnish *primâ facie* evidence

[36] Barr v. Perry, 3 Gill, 313, 317; Dumay v. Sanchez, 71 Md., 508, 511; 18 A., 890; Genesee Co. Sav. Bk. v. Michigan Bay Co., 52 Mich., 164, 166; 17 N. W., 790.

of the liability of such property to seizure by the terms of the statute under which he is proceeding.[37]

§ 83. Right of plaintiffs to sue and liability of defendants to be sued in special characters, such as partners, executors, administrators, trustees, receivers, assignees, heirs, devisees, legatees or distributees, or as associations, or corporations, or as husband and wife.—Whenever plaintiffs undertake to sue in special characters, or to sue defendants in any other capacity than as individuals, the law casts upon them the burden of proving their right to sue in such character and also of establishing the liability of the defendants in the capacity in which they are charged, for without such proof the plaintiffs could not show their right to a judgment against the defendants.

(a) Partners.—Plaintiffs may prove their partnership by their own oral testimony or that of their clerks or employees, or of any other person, who had personal knowledge of the existence of the relationship at any time when its existence was material, and this is equally applicable whether the agreement of

[37] Locke v. United States, 7 Cr., 399. Lillienthal's Tobacco Co. v. U. States, 97 U. S., 237, 264.

partnership was made orally or in writing.[38] They may prove the partnership of the defendants by the same kind of testimony and also by the admissions of the parties sought to be charged as partners, or by proof that they held themselves out to the public as partners by their acts or conduct.[39] The production of a written partnership agreement with the proof of its execution while always admissible evidence is not required excepting in controversies between the parties themselves or their representatives to determine their respective rights and liabilities under it.[40] It is always sufficient to establish the liability of a defendant as an alleged partner to show that by agreement he had a right in the entire net profits of the business which entitled him to a definite share of it, in the absence of evidence that he received it not as profits of a principal or of money, but in some other character not involving that of a partner, as

[38] Abb. Tr. Ev., Ch. IX, 1. Gilbert v. Whidden, 20 Me., 368.

[39] Abb. Tr. Ev., Ch. IX, 9, 12, Waugh v. Carver, 2 H. Blk., 235. Fletcher v. Pullen, 70 Md., 207; 16 A., 887; Burns v. Rowland, 40 Barb., 368; Smith v. Smith, 27 N. H., 244; 1 Lindly Part., 47.

[40] 2 Gr. Ev., Sec. 479; 1 Elliott Ev., § 604.

for instance that of an employee.[41] For purposes of convenience it has been provided by statute in many of the States that when a partnership between either the plaintiffs or the defendants is alleged in the pleadings such partnership shall be deemed to be admitted for all purposes of the case unless expressly denied in the next succeeding pleading. Excepting in such cases and even in them when they are disputed, it is incumbent upon the plaintiff to furnish proof as above set forth of all partnerships alleged by him in his pleadings.[42]

(b) Executors and administrators.—The plaintiff who sues as executor or administrator of another must produce evidence of his authority to act as such under the seal of a court of the state where the suit is brought, competent to grant letters testamentary or of administration.[43] It must be remembered that letters testamentary or of administra-

[41] Abb. Tr. Ev., Ch. IX, 18, Cox v. Hickman, 3 Ho. Lords Cas., 268, 306; Eastman v. Clark, 53 N. H., 276; 16 Am. R., 192; Parker v. Canfield, 37 Conn., 250; 9 Am. R., 317.

[42] Cooper & Co. v. Coates & Co., 21 Wall., 105, 110.

[43] 2 Gr. Ev., § 338, Abb. Tr. Ev., Ch. IV, 1, 3, 4, Noonan v. Bradley, 9 Wall., 394, 399.

tion granted to a person in one state do not entitle him to sue as executor or administrator in another state. In order to do this he must take out letters either principal or ancillary in every state in which he brings suit. And one who sues another as executor or administrator must also produce like evidence of the defendant's liability as such.[44] This however does not apply to suits brought by or against executors or administrators in their individual capacities upon causes of action that accrued after the death of their decedents, even though they be therein described as executors or administrators; for in such cases the plaintiff's right of action does not arise out of the transactions of the decedent in his lifetime, but from his own dealings with the latter's estate after his decease, and the title of executor or administrator added to a party's name need not be regarded as a declaration of the character in which he sues or is sued, but as a mere description for the purpose of identification which might be stricken out as surplusage—as in cases where the plaintiff's cause of action arises from a contract made with him

[44] 2 Gr. Ev., § 343; Austin v. Munroe, 47 N. Y., 360; Davis v. Vansanda, 45 Conn., 600.

personally after having taken out letters, or where the judgment if rendered against the defendant would be payable *de bonis propriis* and not *de bonis testatoris.* In such cases the plaintiff's right to sue and the defendant's liability to suit, not being wholly dependent upon the letters testamentary or of administration held by them, the proof of such letters may generally be dispensed with.[45]

(c) **Trustees.**—When plaintiffs sue trustees the burden is upon them to prove the existence of the trust under which they act and this necessity involves the fact and manner of its creation. If the trust was created by parol it may be proved by parol, and when it had a documentary origin the document or documents that created it must be produced and identified, or proved by secondary evidence in cases where the latter is admissible.[46] But it has been held that where a trust has been

[45] Schouler Exr., §§ 289 to 294; Patchen v. Wilson, 4 Hill, 57; Biddle, Admr. v. Wilkins, 1 Pet., 686; Barton, Exr. v. Higgins, 41 Md., 545; Lucas v. Byrne, 35 Md., 485, 94; Harper v. Butler, 2 Pet., 237.

[46] Abb. Tr. Ev., Ch. XI, 1; Chew v. Brumagen, 13 Wall., 497, 503.

created by a document which does not fully set forth its terms, as where property is conveyed by deed to one as Trustee without specifying the terms of his trust, that the latter may be proved by oral evidence *aliunde*.[47] In cases where the trustee was appointed by a decree or order of Court a duly authenticated copy of such decree or order should be produced in evidence. The same burden of proving the existence and terms of the trust, as well as its acceptance by the alleged trustee, is also imposed upon the plaintiff who sues another as trustee, and may be discharged in like manner. But whenever the cause of action is a contract shown to have been made by the defendant with the plaintiff as trustee in the character in which he sues, or to have been made by a defendant sued as trustee in terms admitting his own liability as such trustee, the burden will be deemed satisfied by proof of the making of such contract by the defendant, as he would thereby be estopped from denying the trusteeship in either case.[48] It has been said that before a suit can

[47] Railroad Co. v. Durant, 95 U. S., 576; Kingsbury v. Burnside, 58 Ill., 319; 11 A. R., 67.

[48] St. Dig., art. 102, Pickard v. Sears, 6 A. & E., 469, 474; Morgan v. R. R. Co., 96 U. S., 716.

be brought against a trustee, as such, he must be shown to have had notice of the duty he is required to perform and an opportunity to perform it, but this rule is held not applicable in a case where the trustee is himself an actor in the transaction and has full knowledge of his duties.[49]

(d) Receivers.—Plaintiffs suing as receivers must in all cases where their right of action became vested in them by their appointment as receivers, produce the decree or order of court conferring the appointment and also proof of their having given bond as therein provided, where a bond is required by the terms of such decree or order; and when the receivers' right to sue is given by a special order passed subsequently to his appointment, such order should also be proved.[50] Such proof is not required in cases where the right of action is not derived through their appointment, as where they sue on contracts made with them as receivers.[51] Neither is it

[49] Brent v. Maryland, 18 Wall., 433, 434.

[50] Abb. Tr. Ev., Ch. X, 2; Potter v. Merchants Bk., 28 N. Y., 641; 86 Am. D., 273, 281.

[51] Abb. Tr. Ev., Ch. X, 1; White v. Joy, 13 N. Y., 83; Iglehart v. Bieran, 36 Ill., 133; High on Receivers, § 243.

required in cases where the action is brought in the name of the person over whose estate he has been appointed for the use of the receiver, for in such case the right of the equitable plaintiff to recover can only be disputed by attacking the right of the plaintiff's attorney to bring the suit in that form, which will always be presumed until cause to the contrary be shown.[52] Nor in cases where the receiver sues as assignee of the party whom he represents,[53] the proof of the execution of the assignment being deemed sufficient even though it was made by order of the Court passed in the proceeding in which the receiver was appointed, provided such assignment complies with the requirements of the statute enabling an assignee to sue as such in his own name.

In actions brought against defendants as receivers it is also incumbent upon the plaintiffs to prove their appointment and qualification, and because of the general rule that a receiver being a public officer cannot unless expressly authorized by statute be sued with-

[52] Lycoming Fire Ins. Co. v. Langley, 62 Md., 196, 202.

[53] High on Receivers, § 244; Graydon v. Church, 7 Mich., 36.

out leave of the Court by which he was appointed,[54] it is always prudent to prove that such leave has been given whenever this is the fact. It has been held by some of the State Courts that leave to sue receivers from the Court that appointed them is not a jurisdictional fact and therefore need not be proved, and that the effect of suing without leave, is not to nullify the action but at most to subject the party bringing the suit to the penalties of a contempt of the Court which appointed the receiver.[55] A different rule however, prevails in the Courts of the United States, which have held that no Court has jurisdiction to entertain suits brought against receivers without leave of the Court by which the latter were appointed unless such suits are shown to be within the terms of some statute like that of March 3rd, 1887, sec. 3 (24 U. S. Stats. 552), authorizing a receiver appointed by Courts of the United States to be sued without leave in respect to any act

[54] Porter v. Sabin, 149 U. S., 473, 479.

[55] Chataqua Co. Bank v. Risley, 19 N. Y., 69; 75 Am. D., 347; Walling v. Miller, 108 N. Y., 173; 15 N. E., 65; 2 Am. St. R., 400; Mulcahey v. Strauss, 151 Ill., 70, 80; 37 N. E., 702; Blumenthal v. Brainard, 38 Vt., 402; 91 Am. D., 349.

or transaction of his in carrying on the business connected with the property held by him as such receiver.[56] But whatever jurisdiction other Courts may have to entertain suits against receivers without leave, the plaintiffs in such suits would have great difficulty in enforcing the judgments therein rendered against any property in possession of or controlled by receivers without the consent and co-operation of the Court which appointed them.[57]

(e) **Assignees.**—In suits brought by plaintiffs in their own names as assignees the burden is upon them to prove by competent evidence the execution, prior to the time of bringing their suit, of the assignment under which they claim and whenever such assignment was by writing to produce or satisfactorily account for the nonproduction of the original document at the trial.[58] This applies to assignments of every kind, whether by

[56] Barton v. Barbour, 104 U. S., 126; Brown v. Rausch, 1 Wash., 497; 20 Pacif., 785; Malott v. Shimer, 153 Ind., 35; 54 N. E., 101; 74 Am. St. R., 278, and note p. 285.

[57] Wiswall v. Sampson, 14 How., 52, 66.

[58] Abb. Tr. Ev., Ch. I, 2-12; Garrigue v. Loescher, 3 Bosw., 578.

parol or deed, and whether limited to the particular property involved in the suit or covering the whole property of the assignor as in the case of general assignments for the benefit of creditors in case of insolvency or bankruptcy.[59] As by the common law choses in action were not assignable in such manner as to enable the assignees to sue upon them in their own names, but have been made so assignable by statute in most if not all the states and territories, it is incumbent upon the assignee suing in his own name upon an assigned chose in action to produce an assignment fully complying with all the requirements of the statute of the state in which the action is brought. The validity in other states of an assignment of property made pursuant to an insolvent law or to a receivership proceeding in the debtor's domicil, where the assignee is in effect an officer of the Court and the property is administered under its direction, would depend largely upon the policy of the law of the forum in which such assignment is sought to be enforced, as it would not convey a clear legal title to the debtor's property

[59] Abb. Tr. Ev., Ch. I, 2; Bowman v. Killiman, 65 N. Y., 598.

outside of the state of his domicil, and its efficacy would depend wholly on the comity of the Courts in such State. Any rights claimed under such assignments would as a rule be subordinated to the claims of creditors who had acquired a lien by attachment or otherwise upon any property of their debtor in another state before it had already come into the actual possession and custody of the assignee or receiver.[60]

(f) Heirs, devisees, legatees and distributees.—When plaintiffs sue to enforce rights or recover property claimed by them as heirs, devisees, legatees or distributees of the estate of a decedent, the burden is always upon them to establish by affirmative evidence the fact that they stand in that particular relationship to the decedent from which the right of action asserted by them has arisen. Such evidence often includes proof of the death of the decedent, and of his or her marriage and of the birth, marriage death and issue of any descendants or other relations of the decedent who would have prior or

[60] Brantley Pers. Prop., § 343; Dearing v. McKinnon & Co., 165 N. Y., 78; 58 N. E., 773; 80 Am. St. Rep., 707; Catlin v. Wilcox Silver Plate Co., 123 Ind., 477; 24 N. E., 250; 18 Am. St. R., 338.

equal rights with the plaintiff to the property sued for or any of it. Such facts as death, birth and marriage may always be established by the oral testimony of any competent witness who was present when they occurred,[61] and also by entries made in public records in performance of a duty,[62] and by the declarations of deceased relatives or connections by marriage of the person concerning whom they testify.[63] The burden of proof of death may be sustained *primâ facie* by presumptive evidence, as for instance by proof that the alleged decedent if now living would be a century old,[64] or that he has been absent from his last established place of living and has not been heard of by those who would be likely to have heard of him if alive for seven years or over.[65] When proof of continuous absence for seven years, without having been heard from, has raised a presumption of death suffi-

[61] Abb. Tr. Ev., Ch. V, 1, 14; Secrist v. Green, 3 Wall., 750.

[62] See § 30 *ante*.

[63] See § 49 *ante*.

[64] Hammond's lessee v. Inloes, 4 Md., 138, 172,—75; Young v. Schulenberg, 165 N. Y., 385, 389; 59 N. E., 135; 80 Am. St. Rep., 730, 3.

[65] Davie v. Briggs, 97 U. S., 628, 633. Sprigg v. Moale, 28 Md., 497; 92 Am. D., 698.

cient to overcome the disputable presumption of continuing life, comparatively slight evidence is sometimes sufficient to enable a court to find that the death presumed must have occurred long before the end of the seven years during which he was not heard from.[66]

While the fact of marriage may be presumed from the general reputation of persons living together as man and wife, it must be remembered that such a reputation can be founded on a general and not a divided or singular opinion, for when opinion in such case is divided it amounts to no evidence at all.[67] The presumption of legal marriages thus raised by proof of general reputation has its limits, and may be overcome by counter evidence and counter presumptions. Strict proof is required when such a presumption would invalidate a subsequent formal marriage.[68]

[66] Abb. Tr. Ev., Ch. V, 4. Davie v. Briggs, *supra.*

[67] Barnum v. Barnum, 42 Md., 251, 297; Williams v. Herrick, 21 R. I., 401; 43 A., 1036. See 2 Wigmore on Ev., § 1603 (2).

[68] Jackson v. Jackson, 80 Md., 176, 185; 30 A., 752; Jones v. Jones, 48 Md., 391, 397; 30 Am. R.,

The usual way of proving births, in the absence of witnesses who were present, is by proof of declarations of deceased relations or connections, including entries made by them in family bibles or testaments, or by entries made by others in official registers in the course of public duty,[69] or by proof that persons dwelt or consorted together as members of one family in the apparent relation of parent and child and assisted and depended on each other as such.[70] There is no legal presumption of failure of issue, and therefore when the assumption that any person died without issue is essential to the establishment of the plaintiff's case, this throws upon him the burden of proving such failure by affirmative evidence.[71]

Wills.—When the plaintiff's claim is dependent upon a will, as when he sues as

466; Bowman v. Little, 101 Md., 273; 61 A., 233, 657, 1084; Badger v. Badger, 88 N. Y., 546; 42 Am. R., 263.

[69] See §§ 30 and 49 *ante*.

[70] Abb. Tr. Ev., Ch. V, 29, B. & O. R. R. Co. v. Gettle, 3 W. Va., 376, 85; Matheny v. Bohn, 160 Ill., 263, 43 N. E., 380.

[71] Sprigg v. Moale, 28 Md., 497, 505: 92 Am. R., 698, Abb. Tr. Ev., Ch. V, 13a.

devisee or legatee or as the heir or personal representative of a devisee or legatee, the burden is always upon him to prove the execution and validity of the will under which he claims.[72] Where the will has been duly admitted to probate a copy of it and of the decree of the probate court duly authenticated is sufficient to establish the will *primâ facie* and shift upon the adversary the burden of disproving the validity of the instrument.[73] But where the will has not been probated, as in proceedings to establish it before probate courts, the burden is upon the proponent of the will. In such cases *primâ facie* proof of the execution of the will and of the testamentary capacity of the testator may be ordinarily established by the evidence of the attesting witnesses, or by proof of their signatures and that of the testator when the witnesses are dead or when their testimony is unobtainable.[74] The only effect of such *primâ facie* proof is to shift the burden upon the party contesting the will so long as there is no con-

[72] Abb. Tr. Ev., Ch. V, 58; Washburn Real Property, 371.

[73] Abb. Tr. Ev., Ch. V, 59, Whar. Ev., §§ 66, 811.

[74] Abb. Tr. Ev., Ch. V, 61; Schouler v. Willis, § 348; Higgins v. Carlton, 28 Md., 115, 92 Am. D., 666.

flicting evidence, for the introduction of such evidence would impose upon the party propounding the will, or those claiming under it the burden of establishing its validity by a preponderance of proof.[75] The probate of a will by a court of competent jurisdiction is held at common law and under the statutes in force in most if not all the states, to be conclusive proof in all collateral proceedings of its validity as to personal estate, and *primâ facie* proof of its validity as to realty.[76] Some of the Statutes make it also conclusive as to realty.

(g) **Associations.**—Associations have been defined as bodies of persons acting together without a charter but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.[77] In the absence of statutory authority such associations ordinarily cannot sue in their associate name or in the names of their officers, but all the members must unite as individuals having a joint interest in the affairs of the Association.[78] So also suits against such

[75] Abb. Tr. Ev., Ch. V, 61, 62.

[76] Abb. Tr. Ev., Ch. V, 60, case of Broderick's Will, 21 Wall., 503, 2 Whar. Ev., § 811.

[77] 4 Cyc., 301.

[78] Detroit Schutzenbund v. Detroit Agitation

associations must in the absence of statutory authority be brought against the individual members composing it.[79] In such suits the burden is upon the plaintiff to prove by competent evidence who the persons composing such association are at the time of bringing the suit.[80] The members are generaly regarded as partners in their relations and liabilities to third parties,[81] but not as partners *inter sese*.[82]

Although the courts of equity and in some instances the courts of law have modified the common law rule by permitting one or more members to bring suits on behalf of all the other members when the latter were too numerous to be joined as plaintiffs without great inconvenience, it has been held by some of the

Verein, 44 Mich., 313; 38 Am. R., 270; Metal Stamping Co. v. Crandall, 17 Fed. Cas., 171 No. 9,493c; Williams v. Michigan Bk., 7 Wend., 539, 542; Curd v. Wallace, 7 Dana, 190; 32 Am. D., 85.

[79] Davison v. Holden, 55 Conn., 103; 10 A., 515; 3 Am. St. R., 40; Am. Steel, etc., Co. v. Wire Drawers Union, 90 Fed., 598.

[80] Kuehl v. Meyer, 50 Mo. App., 648.

[81] Babb v. Reed, 5 Rawle, 151; 28 Am. D., 650.

[82] Burke v. Roper, 79 Ala., 138; Ash v. Guie, 97 Pa. St., 493; 39 Am. Rep., 818.

courts that in such cases all the other members should be made defendants.[83]

It is always incumbent upon the plaintiffs in suits for and against associations to prove the joint interest of all the plaintiffs and the joint liability of all the defendants as to the subject matter of the suit.[84]

(h) Corporations.—In all suits by or against corporations the burden is upon the plaintiff to prove the incorporation of every party to the cause, suing or sued as a body corporate.[85] This burden may be ordinarily sustained by producing an authenticated copy of the Charter or the instrument or instruments which, with proper legislative sanction, purport to confer corporate powers or recognize them as actually existing, with evidence of the acceptance of such charters by the persons to whom it was granted, and their organization thereunder and user of the corporate franchises.[86] Acceptance and user may

[83] Mears v. Moulton, 30 Md., 142; Snow v. Wheeler, 113 Mass., 179; Liederkranz Singing Soc. v. Germania Turner Verein, 163 Pa. St., 265; 29 A., 919; 43 Am. St. R., 798, and note to Phipps v. Jones, 59 Am. D., 711.

[84] Whitney v. Mayo, 15 Ill., 251.

[85] Abb. Tr. Ev., Ch. III, 1.

[86] Ib., Ch. III, 2, Cook on Corporations, sec. 753.

be shown by any evidence that the body in its organic capacity, as distinguished from the individual conduct of the corporators, acted under the charter, except in cases where the charter prescribes a different method of proof.[87]

If the legislative sanction relied on is a general law the existence of the corporation under it may be proved, unless the law otherwise provides, by producing the certificate of organization which the law requires to be filed, with proof of its filing, or by a certified copy of the record of the certificate where such copy is made evidence by statute.[88]

For convenience, statutes have been enacted in some of the States providing that whenever the incorporation of any of the parties to a suit is alleged in the declaration or complaint, such incorporation shall be deemed to be admitted for all the purposes of that suit by the defendant, unless specifically denied by him in the manner and within the time prescribed by the Statute. In these cases, and in those in which the question of corporation *vel non* is required to be raised by plea in

[87] Ib., Ch. III, 11, 12.

[88] Ib., Ch. III, 13; Benbow v. Cook, 115 N. C., 324, 329; 20 S. E., 453; 44 Am. St. R., 454.

abatement and such plea is not filed, the plaintiff is relieved from the burden of proving incorporation of either party. In cases where the incorporation of the defendant is contested the plaintiff need only prove it to have a *de facto* corporate existence, that is to have been organized professedly under some law or charter under which a corporation with the powers assumed might lawfully be created and to have exercised or held itself out to the public as exercising the powers pertaining to a corporation formed under such charter or law, even where the organization was so defective or irregular as not to be valid as against the State. In such cases the party sued is estopped from denying its corporate existence.[89] The same rule of estoppel is applicable to defendants as to denying, except as hereafter stated, the due incorporation of the plaintiff in suits to enforce contracts made with it as a corporation for a good or valuable consideration whether for subscription for stock or any other indebted-

[89] Abb. Tr. Ev., Ch. III, 15, 19, 22; Finnegan v. Noerenberg, 52 Minn., 239; 53 N. W., 1150; 38 Am. St. R., 552; 18 L. R. A., 778; Marshall v. Keech, 227 Ill., 35; 81 N. E., 29; 118 Am. St. R., 246, 7.

ness.[90] Although as has been said a corporation cannot be created by estoppel,[91] the conduct of the defendants in such cases is deemed to be an admission by them, which they are not allowed to dispute, of the due incorporation of the alleged corporation, and from this admission the jury are at liberty to infer such incorporation, unless it appears affirmatively from evidence in the case that is must have been without legal sanction, as where there was no existing law or charter under which such a corporation could have been created at or prior to the time of the execution of the alleged corporation contract sued on. From introducing evidence of such want of legal sanction the defendants are not estopped.[92]

[90] Abb. Tr. Ev., Ch. III, 19, 20, 21; Cook Corp., sec. 185, 186; Tay. Priv. Corp., sec. 146; Owensboro Wagon Co. v. Bliss, 132 Ala., 253; 31 So., 81; 90 Am. St. R., 907; Jones v. Aspen Hardware Co., 21 Colo., 263; 40 P., 457; 52 Am. St. R., 220; 29 L. R. A., 143.

[91] Boyce v. Trustees M. E. Ch., 46 Md., 359, 73; Heaston v. Cincinnati & Fort Wayne R. R. Co., 16 Ind., 275, 79 Am. Dec., 430; Abb. Tr. Ev., Ch. III, 5.

[92] Clark v. American Cannel Coal Co., 165 Ind., 213, 16; 73 N. E., 1082; 112 Am. St. R., 217; Abb. Tr. Ev., Ch. III, 5, 18.

(i) **Husband or wife.**—The cases in which parties sue or are sued in the characters of husband or wife, may be divided into three classes. (1) Where husband and wife sue jointly to enforce on behalf of the wife some right or claim which has accrued to her or to them through her, or where they are sued jointly to enforce some liability to the plaintiffs which accrued through her. (2) Where the husband sues alone on behalf of his wife on account of a wrong done to her or to himself through her,[93] or when he is sued alone upon some liability incurred by her as his wife, for which the law makes him responsible as her husband, as for example, for debts contracted by her for necessaries upon his credit,[94] or for torts committed by her in his presence.[95] (3). Divorce proceedings and other actions between husband and wife for the enforcement of marital rights and liabilities. In all three classes the burden always rests upon the plaintiffs to prove the facts of the marriage from which their right of action has arisen. In cases of the first and second

[93] As in suits for crim. con., Stewart H. & W., § 79.

[94] Stewart H. & W., § 95.

[95] Stewart H. & W., § 66; Nolan v. Traber, 49 Md., 460, 468; 33 Am. St. R., 277.

classes, except where a celebration at a certain time and place is alleged in the pleadings,[96] and excepting in actions for criminal conversation,[97] this may generally be done by evidence that the parties alleged to be married lived together as husband and wife and bore the general reputation of being such in the community in which they lived, or by the admission of the defendants, made either in their pleadings or orally at or before the time of trial, that they were married as alleged. But in cases of the third class and in others where the existence of the marriage alleged would show a defendant to be guilty of a crime something more is required to prove it. Suits for divorce are in the nature of proceedings *in rem* as they are intended to finally determine as against all the world the matrimonial status of the parties thereto and therefore in them the fact of the marriage upon which that relation depends must be shown by direct evidence and neither mere general reputation,[98] nor the admissions,[99] as distin-

[96] Stewart M. & D., § 135; Redgrave v. Redgrave, 38 Md., 144, 147.

[97] Id.; Catherwood v. Caslon, 13 Mees & W., 261, 264.

[98] 1 Bish., M. D. & S., §§ 932-943, 1057.

[99] 2 Bish., M. D. & S., § 756.

guished from the testimony of the parties concerned are ordinarily deemed sufficient for the purpose. Although in some early American cases of suit for divorce from bed and board, it has been held that further proof of a marriage admitted by the defendant was not required,[100] yet the mass of authorities, both English and American, require proof of the marriage in all cases, nor do they suffer this fact more than any other to be established solely by the admission of the defendant.[101] As the decisions are somewhat conflicting in drawing the exact line between those cases in which the burden of proving a marriage can be discharged by proof of cohabitated with general reputation of being married or by admissions of the marriage by the defendant, and those in which affirmative proof of the celebration is required, it is only prudent to produce the latter in all cases where it is possible to obtain it.

§ 84. Burden of proof in actions ex contractu.—In all actions *ex contractu* the burden is upon the plaintiff to prove the contract with the defendants, a breach of it by the

[100] Harman v. Harman, 16 Ill., 85; Helms v. Franciscus, 2 Bl., 544; 20 Am. Dec., 402.

[101] 2 Bish., M. D. & Sep., § 736.

latter and the amount of damage suffered by the plaintiffs thereby. If the contract is in writing the original document or documents must be produced [1] or their contents shown by secondary evidence in cases where such evidence is admissible,[2] and the execution and delivery of the documents proved.[3] If the contract was verbal or arose by implication it may be proved by oral evidence, but in all cases it must be established *primâ facie* as set forth in the pleadings, either by direct evidence or by evidence of facts from which the law would imply it, or by proof of the admissions of the defendants, as otherwise the court must on motion direct a verdict in favor of the latter.[4] If the contract sued on is claimed to have been made by an agent the burden is upon the plaintiff to prove by affirmative evidence the authority of the agent to make such a contract on behalf of his principal, or the ratification of it by the latter after it was made.[5] When the contract upon

[1] § 66, *ante.*

[2] § 71, *ante.*

[3] § 58, *ante.*

[4] § 78, *ante;* Gambrill v. Schooley, 95 Md., 260, 271; 52 A., 500; 63 L. R. A., 427.

[5] Carroll v. Manganese Steel Safe Co., 111 Md., 252, 73 A., 665.

which the action arises is within the Statute of Frauds it is incumbent upon the plaintiff to show that the requirements of the Statute have been complied with.[6]

There is also imposed upon the plaintiff the further burden of showing such a breach of the contract by the defendant as will furnish the plaintiff with a present cause of action, subsisting at the time of the bringing of his suit, as for instance in the case of an action brought upon a promise to indemnify the plaintiff, where the latter can only recover for the amount of loss or damage which he can prove had been actually suffered by him up to the time of bringing of his suit.[7]

According to the rule laid down in *Hadley* vs *Baxendale,* the leading case on the subject of damages arising from a breach of contract, which has been generally adopted in this country, *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract*

[6] Heaton v. Eldridge, 56 Ohio St., 87, 101; 46 N. E., 295; 60 Am. St. R., 737, 748; 36 L. R. A., 817.

[7] Henderson, etc., Co. v. J. Shillito & Co., 64 Ohio St., 236; 60 N. E., 295; 83 Am. St. R., 750; Wicker v. Hoppock, 6 Wall., 94, 99.

should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.''[8] To enable the jury to fairly estimate the amount of such damages they must ordinarily have before them some evidence of the circumstances under which the contract was made and of the results which followed the breach of it. The burden of producing such evidence rests upon the plaintiff and therefore the nonproduction of a sufficiency of it to enable the jury to determine with any certainty the amount of the damages suffered by him, will prevent him from recovering more than nominal damages,[9] except in cases where the terms of the contract itself show the plaintiff entitled to recover substantial damages for its breach, and also enable the jury to fix the amount of such damages as in cases of contracts to pay

[8] 9 Exch., 341, 359.

[9] Marzetti v. Williams, B. & Ald., 415; Mecklem v. Blake, 22 Wis., 495; 99 Am. Dec., 68; Johnson v. Stear, 15 C. B. (N. S.), 330.

sums of money ascertained or ascertainable from the evidence before the court.[10]

§ 85. Burden of proof in actions ex delicto. In actions for torts the burden is upon the plaintiff to show affirmatively that the defendant has either wilfully or carelessly violated some right of property, person or character of the plaintiff which the law recognizes and protects, or has wilfully neglected, or negligently performed or attempted to perform some duty, imposed by the law upon him towards the plaintiff independently of any contract between them, so as to cause loss or damage to the plaintiff, and also to show the extent of the alleged damages.[11] Before the plaintiff can recover in an action *ex delicto* there must be evidence before the jury of facts from which they can find the existence of some right in the plaintiff which has been violated, or of some duty to him which has been neglected by the defendant. Proof of the violation of any property right of the plaintiff by the defendant entitles the former to a verdict for at least nominal damages

[10] Per Willes, J., in Fletcher v. Tayleure, 17 C. B., 29, and per Bovill, C. J., in British Columbia Saw Mill Co. v. Nettleship, L. R., 3; C. P., 506.

[11] Cooley on Torts, 60; Pollock on Torts, 18.

whether he has suffered any actual damages or not.[12] But in order to recover substantial damages the plaintiff must show that he has suffered actual loss to that extent, or else make it appear to the jury from the evidence that the conduct of the defendant has been characterized by such reckless disregard to the rights of others or such a display of malice as to render him liable for exemplary or punitive damages in addition to ordinary compensatory damages.[13] While it is the duty of the Court to prescribe in every case to the jury, the rule by which the damages must be measured, it is incumbent upon the plaintiff to produce before them evidence of such facts as will enable them to apply this rule and if he fails to produce this evidence he will be unable to recover more than nominal damages.[14]

§ 86. Special rules as to burden in particular forms of action ex delicto.—In actions

[12] Holt, C. J., in Ashby v. White, 2 Lord Raymond, 938; Smith Lea. Cas., 251, 278 (7 ed.); Webb v. Portland Mfg. Co., 3 Summer, 189, 192; 29 Fed. Cas., No. 17,322.

[13] Mayne on Damages (36); Pollock on Torts, 161-165.

[14] Ibid.

on the case for *negligence* the burden is always upon the plaintiff to prove that the injury or damage sued for was occasioned by the negligence of the defendant but there is some difference in the rulings of the Courts as to whether he is also bound to prove affirmatively that he was himself free from contributory negligence before he can recover. The Courts of the United States hold that he is not so bound, and if he can prove his case without showing contributory negligence, that this is a defense to be proved by the defendant.[15] The Courts of Massachusetts on the other hand maintain the rule that the burden is always upon the plaintiff to establish either that he was himself in the exercise of due care or that the injury was in no degree attributed to any want of proper care on his part, and evidence which only partially discloses the facts leaving a case consistent alike with negligence or with care on the plaintiff's part is not enough to sustain a verdict.[16] A third rule on this subject adopted by the

[15] Railroad Co. v. Gladmon, 15 Wall., 401; Indianapolis, etc., R. R. v. Holst, 93 U. S., 291; Abb. Tr. Ev., Ch. XXXI, 34.

[16] Murphy v. Deane, 101 Mass., 455; 3 Am. R., 390; Crafts v. Boston, 109 Mass., 137; 11 N. E., 938.

Courts of New York is to the effect that it depends on the circumstances of each case whether the plaintiff must introduce affirmative evidence that he was not chargeable with negligence before he will be able to recover.[17] Although the rule of the United States Courts seems to be the soundest on principle and the most convenient in practice, yet in view of the uncertainty as to whether or not in any special case pending in one of the State Courts the latter would follow one of the other rules, the prudent practitioner when representing a plaintiff in any of them will always when practicable put in some affirmative evidence to show that his client was entirely free from contributory negligence.

In actions against *public officers for a breach of official duty* the burden is always on the plaintiff to prove every fact necessary to constitute such breach, by evidence sufficiently strong to overcome the presumption of innocence which the law recognizes as strong in their favor.[18]

In actions for *deceit and fraud* the burden

[17] Abbotts Tr. Ev., Ch. XXXI, 36; Johnson v. Hudson R. R. Co., 20 N. Y. 65; 75 Am. Dec. 375.

[18] Abb. Tr. Ev., Ch. VIII, 14; Wilkes v. Dinsman, 7 How., 89, 130.

is on the plaintiff to show that the defendant made representations to him which were false in fact,[19] which the defendant had not good reason at the time of making them to believe to be true,[20] that the plaintiff relied and acted upon such representations,[21] and that he suffered actual loss and damage thereby.[22]

In actions for the *wrongful conversion* of personal property, the burden is upon the plaintiff to show the existence, identity and value of the thing alleged to have been converted, the fact of the conversion and that the plaintiff had either a general or a special property therein with the right to immedate posession thereof at the time of said conversion.[23] The fact of conversion may be estab-

[19] Abb. Tr. Ev., Ch. XXXIV, 4; Bigelow on Fraud, 493; Gray v. Lessington, 2 Bosw., 257; Reeve v. Dennett, 145 Mass., 23.

[20] Cabot v. Christie, 42 Vt., 121; 1 Am. R., 313; Graves v. Lebanon Nat. Bank, 10 Bush., Ky., 23; 19 Am. R., 50; Bigelow on Fraud, 509.

[21] Ming v. Woolfolk, 116 U. S., 599, 602; Jenkins v. Long, 19 Ind., 28; 81 Am. D., 374.

[22] Ming v. Woolfolk, 116 U. S., 599, 602; Munroe v. Gairdner, 3 Brev., 31; 5 Am. D., 531.

[23] Union S. Y. & T. Co. v. Mallory, etc., Co., 157 Ill., 554, 560; 41 N. E., 888; 48 Am. St. R., 341, 343; Wilson v. Wilson, 37 Md., 1, 17; 11 Am. R., 518;

lished by proof of the failure of the defendant to surrender the property to the plaintiff after a formal demand has been made upon him therefor.[24]

In actions for *trespass to personal property* the burden is upon the plaintiff to show some unlawful interference by the defendant with property then in the actual or constructive possession of the plaintiff or to which he then held title[25] with a right to the possession thereof.

In actions for *trespass to real property* the burden is on the plaintiff to prove the unlawful entry by the defendant upon land which was either in the actual possession of the plaintiff or which he had title to with the right to the immediate possession of it at the time,[26] or to which he had a right in reversion or re-

Johnson Brinkman Commission Co. v. Central Bank, 116 Mo., 556, 619; 22 S. W., 813; 38 Am. St. R., 615, 619; Hostler's Admr. v. Skully, Taylor (N. C.), 152; 1 Am. Dec., 583.

[24] Bolling v. Kirby, 90 Ala., 215; 7 So., 914; 24 Am. St. R., 789, 792, with extended note; Union S. Y. & T. Co. v. Mallory, *supra.*

[25] Johnson v. Wilson, 137 Ala., 468, 470; 34 So., 392; 97 Am. St. R., 52, 53.

[26] Foster v. Fletcher, 7 T. B. Mun., 534; 18 Am. Dec., 208.

mainder in cases where the alleged trespass would work an injury to the inheritance.[27]

In actions on the case *for creating or maintaining a nuisance* the burden is on the plaintiff to show his title to the land or the incorporeal right therein injuriously affected by such nuisance, the existence of the nuisance, the responsibility of the defendant therefor,[28] that, in cases where the nuisance amounts to a public one, it inflicts upon him a special and particular damage differing in kind from that sustained by the community in general,[29] and in all cases the nature and extent of the damage incurred by him therefrom.[30]

In actions of *replevin* the burden is on the plaintiff to show that he was the owner of, or lawfully entitled to the posession of the prop-

[27] Cherry v. Lake Drummond, etc., Co., 140 N. C., 422; 53 S. E., 138; 111 Am. St. R., 850.

[28] Garland v. Aurin, 103 Tenn., 555, 562; 53 S. W., 940; 76 Am. St. R., 699, 702.

[29] Acme Fertilizer Co. v. State, 34 Ind. App., 346, 350; 72 N. E., 1057; 107 Am. St. R., 190, 193; Kinney v. Koopman, 116 Ala., 310, 321; 22 So., 593; 67 Am. St. R., 119, 123; 37 L. R. A., 497; Sloss Sheffield Steel Co. v. Johnson, 147 Ala., 384; 41 So., 907; 119 Am. St. R., 89.

[30] Balto., etc., R. R. Co. v. Quillan, 34 Ind. App., 330, 337; 107 Am. St. R., 183, 188.

erty replevied at the time of the bringing of the suit,[31] and that said property was then in possession of the defendant.[32] Where the defendant comes lawfully into the possession of the property originally, a previous demand for it must be made in order to show the wrongful detention necessary to sustain the action.[33]

In actions for *assault and battery* the burden is upon the plaintiff to prove the fact of the assault and to identify the person by whom it was committed as either the defendant himself or his servant; and in the latter case to show that the defendant had given him authority or made it his duty to act in respect to the business he was engaged in at the time the wrong was committed, and that the act was done in the course of his said employment for the defendant.[34] If the wrong com-

[31] Shaddon v. Knott, 2 Swan., 358; 58 Am Dec., 63, 65; Oleson v. Merrill, 20 Wis., 462; 91 Am. D., 428.

[32] Reid, Murdock & Co. v. Ferris, 112 Mich., 693, 695; 71 N. W., 484; 67 Am. St. R., 437, 439; Sinnott v. Feioch, 165 N. Y., 444, 448; 59 N. E., 265; 80 Am. St. R., 736, 738, note; 53 L. R. A., 565.

[33] Galvin v. Bacon, 11 Me., 28; 25 Am. Dec., 258; Oleson v. Merrill, 20 Wis., 462; 91 Am. Dec., 429.

[34] Lake Shore Ry. Co. v. Prentice, 147 U. S., 101,

mitted consisted in doing in an unlawful manner what it was within the scope of the servant's employment to do in a lawful manner it is only necessary to prove the latter fact to hold the master responsible for it. Thus where a conductor was authorized to put off his train passengers who refused to pay their fare, but in expelling the plaintiff under such circumstances used unnecessary violence his employer was held liable for such misconduct of its conductor although it had neither previously authorized nor subsequently approved it.[35]

Although the law will always presume some damage, even if it may be only nominal, to have been suffered from an unjustifiable asault, substantial damages can only be recovered when determined by a verdict to be justified under the circumstances of the particular case. It is therefore always incumbent upon a plaintiff who seeks substantial

109; Barber v. City of Cape Girardeau, 197 Mo., 382, 392; 95 S. W., 230; 114 Am. St. R., 763, 769.

[35] B. & O. R. R. v. Blocher, 27 Md., 277, 286; B. & O. R. R. v. Barger, 80 Md., 23; 30 A., 560; 45 Am. St. R., 314; 26 L. R. A., 220; Lexington Ry. Co. v. Cozine, 111 Ky., 799; 64 S. W., 848; Am. St. R., 930.

damages to produce such evidence of the facts attending the assault or the consequences which followed it as will warrant the finding of substantial damages by a jury.

In actions for *malicious prosecution* the burden is upon the plaintiff to show: 1st. That a criminal prosecution or a proceeding to put him into involuntary bankruptcy has been instituted against him for an offense of which he was innocent (which is usually done by producing an authenticated copy of the record). 2nd. That such proceding was instituted by the procurement of the defendant. 3rd. That it was instituted without probable cause known to the defendant at the time it was instituted. 4th. That the defendant was actuated by malice against the plaintiff in procuring or furthering the said prosecution, and, 5th. In cases where substantial damages are sought, to show the facts and circumstances from which the jury may be enabled to estimate the extent of such damages.[36] The record of the prosecution terminating in an acquittal or a *nolle pros.* which is the foundation of the plaintiff's cause of action while indispensable is not conclusive nor indeed of

[36] Wheeler v. Nesbitt, 24 How., 544, 550; Stewart v. Sonneborn, 98 U. S., 187.

itself sufficient proof of the plaintiff's innocence of the charge against him and must be supplemented by further affirmative evidence, for it is one thing to fail to obtain a conviction of guilt and quite another thing to prove the innocence of the accused, and it is this alleged innocence of the plaintiff which lies at the very root of his action.[37] It is not enough to show that the plaintiff was in fact innocent of the charge on which he was presented, it must be further shown that the defendant instigated the prosecution without having reasonable grounds for belief at the time he so instigated it that a probable cause for such prosecution then existed.[38] As this imposes upon the plaintiff the difficult burden of proving a negative it will be satisfied with slighter evidence than would be required to prove an affirmative,[39] but it cannot be inferred merely from the evidence of express malice on the part of the defendant, for the more reasonable the grounds that the latter might have for believing the plaintiff to have misappropriated his property the greater would be the temptation to entertain feelings of ex-

[37] Stewart & Sonneborn, 98 U. S., 187.

[38] Whitfield v. Westbrook, 40 Miss., 34.

[39] Haupt v. Pohlman, 16 Abb. Pr., 301.

press hostility towards him; neither can want of probable cause be inferred from the unsuccessful result of the prosecution for we all know that many prosecutions fail for which there was very strong probable cause.[40] There must be some additional evidence that probable cause was wanting. Proof of the plaintiff's previous good character has been received for this purpose.[41]

In actions for *false arrest and imprisonment* the burden is on the plaintiff to show that he has been unlawfully detained or restrained of his liberty, either with or without process of law, by the plaintiff or by some one acting under his direction or command or by his authority and with his subsequent approval.[42] But a defendant cannot be held answerable in this form of action for acts done upon his information or suggestion by

[40] Stewart v. Sonneborn, 98 U. S., 187.

[41] Blizzard v. Hayes, 46 Ind., 166; 15 Am. Rep., 291.

[42] Pollock on Torts, 191; Rich v. McInernay, 103 Ala., 345; 15 So., 663; 49 Am. St. R., 32; Tryon v. Pingree, 112 Mich., 338, 345; 70 N. W., 905; 67 Am. St. R., 398, 404, and note p. 408 (quoting Comer v. Knowles, 17 Kan., 441); 37 L. R. A., 222; Hebrew v. Pulis, 73 N. J., L., 621; 64 A., 12; 118 Am. St. R., 716, and note.

an officer of the law in the exercise of his proper authority or discretion and not done as merely ministerial acts. Thus a defendant upon whose testimony a magistrate issued a warrant under which the plaintiff was unlawfully imprisoned is not liable in an action for false imprisonment because he did not set a ministerial officer in motion, but a judicial officer whose opinion and judgment were interposed between the charge and the imprisonment.[43] Such a person however, might be held liable in an action for malicious prosecution if the arrest had been made by his procurement.[44]

In actions for false imprisonment malice need not exist though if present it may be considered in aggravation of damages.[45] In cases of arrests without warrants which would be held unlawful in the absence of probable cause for making them, it is submitted that the burden of proof as to the existence of such cause is cast upon the defendant as part of his case, and the plaintiff is not re-

[43] Willes, J., in Austin v. Dowling, L. R., S. C. P., 530, 540; Rich v. McInernay, and other cases, *supra*.

[44] Tryon v. Pingree, *supra* and note.

[45] Rich v. McInernay, *supra*.

quired to prove affirmatively that there was no such cause, as in actions for malicious prosecution.[46]

In actions for *slander or libel* the burden is on the plaintiff to show: 1st. The utterance of the alleged slanderous words, substantially as set forth in the pleadings, in the hearing of some person other than the plaintiff, who is capable of understanding them as spoken,[47] or the publication of the alleged libel in the exact words set forth in the declaration to some such third person by defendant.[48] 2nd. If the words spoken or the alleged libel do not appear to be actionable on

[46] See note 67 Am. St. R., p. 415, on probable cause and cases there cited. I have not found any case where the burden of proving want of probable cause was imposed on the plaintiff in an action for false arrest and imprisonment.

[47] Odgers, L. & S., pp. 111, 537, 538, 540; Hirsch v. Ringwalt, 3 Yates (Pa.), 508; 2 Am. Dec., 392; Desmond v. Brown, 29 Iowa, 53; 4 Am. Rep., 194; Odgers, L. & S., 150; Hurtort v. Weines, 27 Iowa, 134; Dallavo v. Snider, 143 Mich., 542; 107 N. W., 271; 114 Am. St. Rep., 684, 686.

[48] Odgers, L. & S., 536; Bell v. Byron, 13 East, 554; Tabart v. Tipper, 1 Camp., 350; Colvard v. Black, 110 Ga., 642; 36 S. E., 80; Odgers, L. & S., 150; Spaits v. Poundstone, 87 Ind., 322; 44 Am. Rep., 773.

their face but are made so by *innuendo*, the facts establishing such *innuendo*.[49] 3rd. If the words or publication are privileged the existence of express malice to make them actionable.[50] 4th. Any facts or circumstances to be considered by the jury in estimating the general damages allowed by them and also any special damages properly set forth and claimed in the pleadings.[51] The falsity of the alleged defamatory publication is always presumed unless there is a plea of justification in which case the burden of proving the charge to be true is always upon the defendant who justifies.[52]

[49] Russell v. Kelly, 44 Cal., 641; 13 Am. Rep., 169, 171; Odgers, L. & S., 113; Capital and Conatie Bank v. Harity, L. R., 5; C. P., Div. 514.

[50] Nichols v. Eaton, 110 Iowa, 509, 512; 81 N. W., 792; 80 Am. St. R., 319; 322; 47 L. R. A., 483; Bearse v. Bass, 88 Me., 521, 544; 34 A., 411; 51 Am. St. R., 446, 452.

[51] Odgers, L. & S., *289, Morey v. Morning Journal Asso., 123 N. Y., 207; 23 N. E., 161; 20 Am. St. R., 730; 9 L. R. A., 621; McDuff v. Detroit Evening Journal Co., 84 Mich., 1; 47 N. W., 671; 22 Am. St. R., 673.

[52] Odgers, L. & S., *169; Conroy v. Pittsburgh Times, 139 Pa. St., 339; 21 A., 151; 23 Am. St. R., 188, 191; 11 L. R. A., 725.

In criminal prosecutions for libel proof of publication to a third party is not required as the law presumes that a false and scurrilous communication made directly to the person libelled would be a public offense as tending to provoke a breach of the peace.[53]

The speaking of the slanderous words may be proved by any person who heard them, but the publication of a libellous writing must be proven by the production of the writing itself excepting in cases where proof by secondary evidence is admissible,[54] and the defendant cannot be required to give evidence of publication if he claim his privilege that such testimony might subject him to the risk of a criminal prosecution.[55] If the defense be made that the words shown by the plaintiff to have been spoken or the writing shown by him to have been published, constitute a privileged communication, the burden is on the defendant to prove all the facts and circum-

[53] State v. Avery, 7 Conn., 266; 18 Am. Dec., 105, 106.

[54] Odgers, L. & S., *535, *536; Abb. Tr. Ev., Ch. XLIII, 9; Winter v. Donovan, 8 Gill, 370, 375.

[55] Odgers, L. & S., *504, *534; Abb. Tr. Ev., Ch. XLIII, 7.

stances required to bring such words or writing within the privilege claimed.[56]

In suits by a husband for *damages for alienating his wife's affections,* or by a wife (in jurisdictions where she has a right to bring such suit)[57] for damages for alienating her husband's affections, the burden upon the plaintiff to prove the marriage may be discharged by evidence of cohabitation and general repute of being man and wife[58] and no proof of adulterous relations between the defendant and the plaintiff's spouse is needed, for the cause of action extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave her husband or so conduct herself that the comfort of married life is destroyed or *vice versâ.*[59] If however the interference is by the wife's parents on an assumption that she is ill treated to an extent justifying her in leaving her husband it raises the presumption that they have acted from commendable mo-

[56] Odgers, L. & S., *269.

[57] Wolf v. Frank, 92 Md., 138; 48 A., 132; 52 L. R. A., 102.

[58] Abb. Tr. Ev., Ch. XLV, 1.

[59] Cooley on Torts, *225; Callis v. Merriweather, 98 Md., 361, 363; 57 A., 201; 103 Am. St. R., 404.

tives, and a clear case of want of justification must be shown by the plaintiff in order to sustain his action against them.[60]

In actions *by a master for enticing away his servant*, the burden is on him to show that the latter was actually in his service at the time, and that the defendant's inducement was the moving cause of the desertion and he must also give some evidence of the defendant's knowledge of the relation.[61]

When a parent brings an action for the seduction of his daughter their relationship may be proved in the manner hereinbefore set forth,[62] and proof of the slightest degree of service rendered by the daughter up to the time of her seduction will be sufficient to maintain the action if followed by evidence from which any loss of such service may be inferred, as for instance pregnancy or impairment of health, but in the absence of proof of actual services rendered by the daughter to her father, his action will be defeated by proof

[60] Cooley on Torts, *225; Abb. Tr. Ev., Ch. XLV, 1; Hutcheson v. Peck, 5 Johns., 196; Huling v. Huling, 32 Ill. App., 519.

[61] Bixby v. Dunlap, 56 N. H., 456; 22 Am. Rep., 475.

[62] See § 83 f., *ante*.

that her parents' marriage was void, as in such case the father would have no legal claim for her service.[63]

It is well established that in an action brought by a husband for *criminal conversation* with his wife, that the burden is upon him of proving his marriage by direct evidence of a celebration, as the law does not regard cohabitation and reputation alone sufficient to sustain a judgment that the wife was guilty of the crime of adultery.[64]

He must also show that the marriage continued to subsist giving him the right to the society and assistance of his wife at the time of the alleged intercourse, for a legal and permanent separation at the time would be a bar.[65] He must also prove the criminal intercourse,[66] and give some evidence as to the previous affection and domestic happiness of himself and wife in order to establish his

[63] Howland v. Howland, 114 Mass., 19 Am. R., 381.

[64] Hutchins v. Kimmell, 31 Mich., 126; 18 Am. Rep., 164.

[65] Harvey v. Watson, 7 Mann & Gr., 644.

[66] Wood v. Matthews, 47 Iowa, 409; Bigaonette v. Paulet, 134 Mass., 123; 45 Am. Rep., 307; Cross v. Grant, 62 N. H., 675; 13 Am. St. R., 607; Tucker v. Coleman, 193 U. S., 473.

claim for damages. Such evidence may include expressions of affection and regard used by either in the presence of the other and the wife's manner of speaking and writing of her husband even when absent from him, and their letters to each other.[67]

In actions of *ejectment* to effect the title to or possesion of real property, as the plaintiff must recover upon the strength of his own title, the burden is upon him to show affirmatively that he has a good title or a valid right to the immediate possession of the land in controversy. The fact that the occupant's title is defective or even that he has no title at all will not help the plaintiff.[68]

§ 87. Burden of proof when limitations pleaded.—When the statute of limitations is pleaded by the defendant this imposes upon the plaintiff the burden of making out a case which is not barred by the terms of the statute, either by showing that his cause of action

[67] Abb. Tr. Ev., Ch. XLVI, 3; Edwards v. Crock, 4 Esp., 39; Willis v. Bernard, 8 Bing., 376; Trelawney v. Coleman, 1 Barn. & Ald., 90.

[68] McCool v. Smith, 1 Black (U. S.), 459, 470; Henderson v. Wanamaker, 80 Fed. R., 234; King v. Mullins, 171 U. S., 404, 436, 437.

arose within the statutory period so pleaded,[69] or that the bar of the statute has been removed by a new promise or other evidence by the defendant, or that some circumstance existed which either prevented the statutory limitation from beginning to run against the plaintiff, or after it began to run suspended its operation long enough to have prevented it from barring his action before his suit was brought.[70] If the contract was made without the state and this fact is proved the burden is shifted to the defendant to show residence within the state for the Statutory period.[71]

§ 88. When burden of proof on defendant. As soon as the plaintiff has made out a *primâ facie* case by evidence of facts which, if believed, would, in the absence of further testimony, on the part of the defendant, be sufficient to entitle him to a verdict, the bur-

[69] 2 Gr. Ev., § 431; House v. Arnold, 122 N. C., 220; 29 S. E., 334, but see Goodell v. Gibbons, 91 Va., 608; 22 S. E., 504.

[70] Somerville v. Hamilton, 4 Wheat., 230, 234; Gross v. Disney, 95 Tenn., 592; 32 S. W., 632; Condon v. Enger, 113 Ala., 233; 21 So., R. 227.

[71] Cole v. Jessup, 2 Barb., 309, 314; Mayer v. Friedman, 7 Hun., 218; aff., 69 N. Y., 608.

den is imposed upon the defendant to either contradict some of the material facts thus set up by the plaintiff, or to introduce evidence of new facts that will furnish a good defense by over-coming some disputable presumptions on which the plaintiff relies, or by raising a stronger presumption in favor of the defendant, or which will defeat the plaintiff's right of action by avoidance in some way. The burden of proving such new facts thus introduced by the defendant is imposed upon him in the same way as the burden of establishing a *primâ facie* case was originally upon the plaintiff. Thus if in a suit by the payee against the maker of a promissory note the latter sets up the defense that it was given without consideration, which if believed would overcome the legal disputable presumption that it was given for value, the burden is upon the defendant to establish by affirmative proof the alleged want of consideration and his failure to do so will entitle his adversary to a verdict.[72] So also where in an action on the case for negligence the defendant sets up the defense of contributory negligence on the part of the plaintiff, which

[72] Ellicott v. Martin, 6 Md., 509; 61 Am. Dec., 327; 1 Dan. Neg. Inst., 129.

however does not appear affirmatively from the evidence offered by the plaintiff, then the burden is upon the defendant to show contributory negligence by the plaintiff and if he fails to do so, the defense can not be sustained.[73] As already heretofore stated, the burden of proof in any proceeding lies at first on that party who substantially asserts the affirmative of the issue and against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption which may appear from the pleadings,[74] but as the proceeding goes on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.[75] Thus where a mar-

[73] Railroad Co. v. Gladmon, 15 Wall., 401; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S., 291, 298.

[74] §§ 78, 79, *ante*.

[75] Ste. Dig., Ev., art. 96; Clement v. Moore, 6 Wall., 299; Great West. R. R. v. Bacon, 30 Ill., 347, 352; Goodwin v. Smith, 72 Ind., 113; 37 Am. R., 144, note; City of Fort Smith v. Dodson, 51 Ark., 417; 11 S. W., 687; 14 Am. St. R., 62; 14 L. R. A., 252; Lake v. Minn., etc., Assn., 61 Minn., 96, 100; 63 N. W., 261; 52 Am. St. R., 538, 578; 42 L. R. A., 809; Dorsey v. Brigham, 177 Ill., 250, 262; 52 N. E., 303; 69 Am. St. R., 228, 236.

ried woman is accused of theft and pleads not guilty, the burden of proof is on the prosecution, but this is shifted to the defendant upon proof that she was in possession of the stolen goods soon after the theft, and she may then by showing that she stole them in the presence of her husband again shift the burden on the prosecution to show that she was not coerced by him.[76]

§ 89. Quantity of evidence required to sustain burden.—In civil cases the party who has the burden of proof on any issue must produce evidence which, if believed by the jury, would in the opinion of the court be legally sufficient to enable them to find the facts necessary to entitle the proponent to a verdict on such issue, for unless such legally sufficient evidence is forthcoming the jury will not be permitted to render a verdict in his favor. It does not follow, however, that evidence legally sufficient to sustain a verdict must be always practically efficient to procure one, for it often happens that the jury do not believe the evidence or some part of it, either because of its inherent improbability and a want of confidence in the ve-

[76] Ste. Dig., Ev., art. 95 (6); citing 1 Russ. Cri., 33 and 2 do., 337.

racity of the witnesses or because of conflicting evidence either direct or circumstantial in the case before them. The burden of proof therefore requires the production of evidence both legally sufficient in the opinion of the judge and practically efficient in the judgment of the jury to prove all the facts necessary to establish the case of the party on whom it rests. Where the testimony is conflicting it is said that the jury should decide according to the preponderance of the evidence,[77] but as it is left absolutely to the discretion of the jurors to determine how much or how little weight they may assign to the testimony of each particular witness, the question of preponderance is one practically resting wholly within their discretion which is limited only by the power of the judges to grant a new trial whenever in their discretion the requirements of justice may demand it under all the circumstances of any particular case.

In criminal prosecutions the burden is always upon the prosecutor to establish by proof beyond a reasonable doubt all the facts required to warrant the conviction of the accused of the crime or misdemeanor whereof

[77] 3 Gr. Ev., § 29.

he stands indicted, which is to say that the facts thus proved must coincide with the hypothesis of the guilt of the accused and also be legally sufficient to establish it, and must likewise be inconsistent with any other hypothesis or with the reasonable supposition of his innocence.[78]

As already stated in a previous section this rule making it obligatory to discharge the burden of establishing the commission of a criminal act by the production of proof beyond a reasonable doubt has been extended in England and in some of the States to cases where the question of the commission of such criminal act becomes relevant in the course of a civil proceeding;[79] but the weight of American authority is to the effect that for all purposes of such civil action the question is to be decided upon the preponderance of the evidence before the jury, since the reason for requiring greater strictness of proof in criminal cases would not be applicable here.[80]

[78] Ibid. See definition of reasonable doubt in Commonwealth v. Webster, 5 Cush., 296, 313, 317, 319; 52 Am. D., 711, and in Holt v. United States, 218 U. S., 245, 253.

[79] § 79 *ante*, and note 7.

[80] Scott v. Insurance Co., 1 Dill. C. C., 105, 207; 21 Fed. Cas., No. 12,533, p. 883; Welch v. Juggenheimer, 56 Iowa, 11; 41 Am. R., 76.

For those cases in which the testimony of a single witness is deemed insufficient to sustain the burden of proof unless supported by corroborative evidence, see §§ 104 to 109 inclusive, *post.*

§ 89a. When burden shifted by fraud or undue influence. In actions by indorsees of negotiable paper against the makers or acceptors, proof by the latter that such paper was obtained by the fraud of the payee imposes upon the plaintiff the burden of proving himself to be a *bonâ fide* purchaser for value in due course.[80a] And whenever there is question as to the validity of any transaction between parties standing in such relation that the one reposes confidence in the other, the burden is always imposed upon the party in whom such confidence is placed to show affirmatively that such transaction was in good faith and valid, and that the authority or influence derived

[80a] Totten v. Bucy, 57 Md., 446; King v. Deane, 139 U. S., 166, 173; Commercial Bank of Danville v. Burgwyn, 110 N. C., 237; 17 L. R. A., 326; 14 S. E. 623; 30 Am. St. R., p. 324; extended note to Bedell v. Herring. Uniform Negotiable Instruments Act, Sec. 59.

from such confidential relation to the other party was not abused—the nature and amount of the evidence required for this purpose being dependent upon the nature of the confidence reposed and upon the character of the transaction.[80b]

[80b] Fisher v. Bishop, 108 N. Y., 25; 2 Am. St. R., 357; 15 N. E., 331; Darlington's Est., 147 Pa. St., 624; 30 Am. St. R., 776; 23 A., 1046. Stev. Dig. Art, 97 A.; Huguenin v. Basely, 2 W. &. T. Lea Cas. Eq., 1156.

CHAPTER II.

RIGHT TO BEGIN.

§ 90. Party who begins must produce his entire case.—The right to begin in the production of evidence is mainly determined by the burden of proof, and is often of much importance; for in cases where there is but a single issue of fact to be tried, the party who begins must exhaust his evidence in the first instance, and may not first rely upon a *primâ facie* case, and, after that has been shaken by his adversary's proof, call other evidence to confirm it.[1] After the adversary has concluded his evidence, the party who began can only adduce further evidence for the purpose of contradicting the affirmative facts introduced into the case by the other side, and may not attempt to disprove them by testimony which merely goes to confirm the allegations originally made by his own pleadings, which are inconsistent with his adversary's case. Thus, in an action by the indorsee of a bill

[1] Tay. Ev., § 386.

against the acceptor, where issue was joined on a plea denying the indorsement, the plaintiff was not allowed to rest his case at first on proof of the indorser's handwriting, and, after evidence for the defense had been given that he was himself too poor to have discounted the bill, and had disclaimed all knowledge of it, to prove that in fact he had discounted the instrument.[2] So, also, in an action by the endorser of negotiable paper against the maker when the defendant set up in his pleadings that the instrument was obtained by the fraud of the payee and that the plaintiff was not a *bonâ fide* holder for value in due course without notice of the fraud, the burden of proof is put upon the plaintiff to show that he is such a *bonâ fide* holder and in order to establish this fact by any proof besides disputable presumption of law to this effect, he must offer all such evidence in chief, and will not be permitted to introduce it in rebuttal; but if the defendant does not raise this defense by his pleadings and goes

[2] Stewart v. Lansing, 104 U. S., 505, 509; Vosburgh v. Diefendorf, 119 N. Y., 357; 23 N. E., 801; 16 Am. St. R., 836; Cover v. Myers, 75 Md., 426; 23 A., 850; 32 Am. St. R., 394; note to Bedell v. Hering, 11 Am. St. R., pp. 324, 325.

to trial on the general issue plea and instead introduces evidence to show that the note was fraudulently obtained and that the plaintiff had notice of the fraud, the plaintiff may offer evidence in rebuttal to contradict any evidence thus introduced by the defendant.[3]

§ 91. Plaintiff has right to begin when the burden of any of the issues is on him, or he seeks substantial unliquidated damages.—The general rule on this subject is, that the party on whom the burden of proof lies, as developed on the record, must begin, unless his adversary will at the trial admit the whole *primâ facie* case of such party, and could not by his pleading have made this admission at an earlier period.[4] But when the record contains *several* issues, and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it ;[5] and therefore the plaintiff is always entitled to begin, whenever he seeks substantial unliquidated damages, though the general issue be not

[3] Jacobs v. Tarleton, 11 Ad. & E. (Q. B., N. S.), 421.

[4] Tay. Ev., § 379 ; Doe v. Smart, 11 M. & Rob., 476.

[5] Tay. Ev., § 384; Abb. Tr. Bf., p. 30; 1 Thomp. Trials, § 228; Cawlins v. Disbrow, 2 M. & Rob., 328.

pleaded, and the affirmative lies upon the defendant; for in such cases the burden of proving the amount of the damage actually sustained is always upon the plaintiff.[6] In cases where several issues are joined, some of which lie on either party, it is optional with the plaintiff either to go into his whole case, in the first instance ,or merely to adduce evidence in support of those issues which he is bound to prove, reserving the right of rebutting the defendant's proofs in the event of the latter establishing a *primâ facie* case with respect to the issues which lie upon him. If the latter course he pursued, the defendant may have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. But if the plaintiff, at the outset, elects to go into his whole case by calling any evidence to repel the case of the defendant, he will not be permitted to give any evidence in reply; for, if such a privilege were allowed to the plaintiff, the defendant, in common justice, might claim the same, and the proceedings might be extended to a very inconvenient length.[7] As

[6] Tay. Ev., § 381; Abb. Tr. Bf., p. 33; 1 Thomp. Trials, § 230; Mercer v. Whall, 5 Q. B., 462.

[7] Tay. Ev., § 385; Browne v. Murray, Ry. & M., 254.

already stated, in cases where there is but a single issue, the party upon whom the burden of proof lies must put forth all his evidence in the first instance.[8] All questions of the mere order of proof are left largely to the discretion of the judge, who has a right (in the absence of any positive rule of court to the contrary) to relax the strict rules by receiving any competent evidence from either party, at any stage of the trial before the case is given to the jury, if in his opinion the ends of justice require it. In practice, however, this discretion is seldom exercised except to let in, out of its regular order, the proof of some merely technical or formal matter, which had evidently been omitted through inadvertence.[9]

[8] *Ante,* § 90.

[9] Phila. & Trenton R. R. v. Stimpson, 14 Pet., 448, 463; Bannon v. Warfield, 42 Md., 22, 39; 1 Gr. Ev., §§ 76, 469a; Tay. Ev., § 388; Bradford v. Freeman, 5 Ex. R., 734.

CHAPTER III.

COMPETENCY OF WITNESSES.

§ 92. All witnesses presumed competent unless objected to—When objection must be made.—Having determined by which side and in what order the testimony is to be produced, the next question to be considered is, what persons are competent to testify. The rule upon this subject is that all persons offered as witnesses are presumed to be competent until the contrary is affirmatively shown to the satisfaction of the presiding judge or judges, by whom all questions of competency are to be determined, and who, for the purpose, may examine the witness himself, or hear any other legal testimony which may be produced upon the subject.[1] Objection to the competency of a witness should be made before his examination in chief, if the disqualification be then known to the party objecting, or, if it be not then known, it must

[1] Best Ev., § 133; Ste. Dig., art. 106; 1 Whar. Ev., §§ 391, 392. 2 Elliott Ev., § 720.

be made as soon as the disqualification appears; for a party who, knowing of objections to the competency of a witness, holds them back until after the witness has been examined, will ordinarily be held to have waived such objection.[2]

§ 93. What rendered a witness incompetent at common law—Want of mental capacity—Want of religious belief—Interest—Being husband or wife of party.—At common law a witness was totally disqualified from testifying by reason of any of the following disabilities, viz.:

(a) Want of mental capacity to recollect the matter on which he was to testify, or to understand the questions put to him, or to give rational answers to them, or to know that he ought to speak the truth. Such mental incapacity may arise from extreme youth, disease of any kind, intoxication, or any other cause whatsoever.[3]

[2] Tay. Ev., § 1392; 1 Whar. Ev., § 393; Groshon v. Thomas, 20 Md., 242.

[3] Ste. Dig., art. 107; 1 Gr. Ev., §§ 365-7; Tay. Ev., §§ 1375-8; State v. Whittier, 21 Me., 341, 347; 38 Am. D., 272; McGuire v. People, 44 Mich., 286; 6 N. W., 669; 37 Am. R., 265; Freeny v. Freeny, 80 Md., 406; 31 A., 304; Wheeler v. United States, 159

(b) Want of belief in the existence of a God who dispenses retribution either in this world or the next; for without such belief the solemnity of an oath could evoke no religious sense of accountability whatever. Want of religious belief is never presumed, but must be proved affirmatively by the party alleging it; the ordinary method being evidence of the declarations of the witness previously made to others.[4] According to the weight of modern authorities, it is not allowable to question a witness as to his religious belief for the purpose of showing him to be incompetent;[5] but it does not seem to have been decided whether he can be interrogated as to his religious belief for the purpose of contradicting the testimony of third persons, alleging him to be incompetent because of such belief.

U. S., 523; District of Columbia v. Armes, 107 U. S., 519. As to competency of young children as witnesses, see State v. Meyer, 135 Iowa, 507; 43 N. W., 322, and extended note to same case in 124 Am. St. R., 291.

[4] 1 Gr. Ev., §§ 368-70; Tay. Ev., § 1385; Omichund v. Barker, 1 Sm. Lea. Cas. (7th Am. ed.), *535, *545; Curtis v. Strong, 4 Day, 51; 4 Am. D., 179.

[5] 1 Gr. Ev., § 370 and note; 1 Whar. Ev., § 396. Contra, Tay. Ev., § 1385; Arnd v. Ameling, 53 Md., 192.

This rule has been modified by statute or constitutional provisions in several of the United States.[6]

[6] 1 Whar. Ev., § 395. Although as the law now stands in those states where it has not been changed by legislation, want of religious belief operates as a positive disqualification to the extent stated in the text, it is not by any means in a satisfactory state upon this point. While, on the one hand, there is no doubt but that the rule requiring all testimony in judicial proceedings to be given under the sanction of an oath gives, in the great majority of cases, a very important security for its truthfulness, for the reason, as has been said, that the generality of mankind are "neither so virtuous as to be safely trusted in cases of importance upon their bare word, nor yet so abandoned as to violate a more solemn engagement," and while it is also undeniable that a man who recognizes himself to be under no moral accountability to a superior being is altogether lacking in the strongest motive for veracity, yet it would be going altogether too far to say that the testimony of such a person must necessarily be so entirely untrustworthy as to justify its being altogether excluded from consideration in judicial proceedings. Such a view is directly at variance with the whole tendency of modern legislation, both in this country and in England, upon the subject of evidence, which is towards removing the common law restrictions upon the competency of witnesses, such as having an in-

(c) Conviction of any crime rendering him infamous, viz.: treason, felony or the *crimen falsi*,[7] which incapacitates the witness from

terest in the result of the trial, or having been previously convicted of an infamous crime, but allowing the fact which formerly formed the ground of such disqualification to be given in evidence to affect the witness's credibility. Upon this principle, the true rule would seem to be, that want of religious belief on the part of a witness should not exclude his testimony, but ought always to be allowed to be given in evidence to affect its credibility, and for this purpose it should be permitted to cross-examine witnesses upon the point. Propriety obviously requires that an oath should not be administered to a person insensible to its obligations, for in such a case the repetition of the words would be a blasphemous mockery; and therefore atheists should be required, as in England under the statute 32 and 33 Vic., c. 68, § 4, to testify upon a solemn promise and declaration which would render them liable to indictment for perjury in case of wilfully and corruptly giving false evidence.

[7] The crimen falsi, as defined by Prof. Greenleaf (1 Gr. Ev., § 373), is an offense which "not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud." It has been held to include forgery, perjury, subornation of perjury, suppression of testimony by brib-

testifying in the courts of the state or country in which he was convicted until the disability has been removed by a reversal of the judgment or a pardon.[8] In most of the states the disqualification of infamy has been removed by constitutional provisions or by statute, but a conviction may be proved for the purpose of affecting the credibility of the witness.[9]

(d) Being a party to the record, or having any direct pecuniary interest in the result of the suit.[10] This disqualification was almost

ery, or conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime, and barratry. *Ibid.*

[8] 1 Gr. Ev., §§ 372-378; State v. Grant, 79 Mo., 113; 49 Am. R., 218; Gertz v. Fitchburg R. R. Co., 137 Mass., 77; 50 Am. R., 285.

[9] 1 Whar. Ev., § 397.

[10] 1 Gr. Ev., §§ 329, 386 et seq. To this rule excluding the testimony of the parties to the suit there were always a few exceptions, as in cases where, it having been first established by other testimony that the defendant had been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the plaintiff's property, the latter was the only person who could prove the amount of damages, he was allowed to testify for that purpose only; and also in other cases where, upon grounds of public

entirely abolished in the courts of the United States by section 858 of the Revised Statutes, passed July 2, 1864, amended March 3, 1865, providing that in those courts *no witnesses shall be excluded "in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in*

policy, his testimony was deemed essential to the purposes of justice, as to prove that he had made diligent search for a lost paper in order to lay a foundation for the admission of secondary evidence of its contents. See 1 Gr. Ev., § 348 et seq. So also, in equity the answer of the defendant, so far as it was strictly responsive to the bill, was admitted in evidence in his favor as well as against him. 1 Gr. Ev., § 351. And where a party was required to render an account of matters of long standing, the court would sometimes exercise its discretion in permitting him to discharge himself by his own testimony of some of the items the vouchers for which had been lost. 2 Dan. Ch. Pr., *1230. See, also, Paige v. Whedden, 59 N. H., 507, 511. These exceptions are of very little practical importance at the present time, as it would be almost impossible to find a case where the party enabled to testify under them has not been rendered competent to testify at least to the same extent, and probably to a much greater extent, by the statutes abolishing the old rule of exclusion.

which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite patry, or required to testify thereto by the court.'' The result of this statute was to cut up by the roots all disqualification on account of interest,[11] and in civil cases to put the parties (except those named in the proviso) upon a footing of equality with other witnesses, making all admissible to testify for themselves and compellable to testify for the others.[12] Statutes to the same general effect, although differing somewhat in their terms, have been passed in all the States of the Union and the Territories, and in many of them the accused, in criminal cases, is made a competent witness in his own behalf, but is not compellable to testify.[13] But by the act of June 29, 1906, this section 858 was amended as follows: ''Sec. 858. The com-

[11] Lucas v. Brooks, 18 Wall., 436, 452.

[12] Texas v. Chiles, 21 Wall., 488.

[13] So also in Federal Courts, see 20 U. S. Stats., 30; Rev. Stats. U. S., § 858 A (Act March 16, 1878, ch. 37).

petency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the Court is held." Inasmuch, however, as all the States and Territories had in the meantime abolished nearly all the disqualification from testifying in civil cases upon the ground of interest in or being a party to the controversy, this amendment made practically but little difference in the law as then existing.

(e) Being the husband or wife of a party to the record, excepting that in criminal proceedings instituted against a person for any bodily injury or violence inflicted upon his wife or her husband, such wife or husband is competent to testify.[14] This exclusion of husband and wife from testifying for or against each other has been held to be partly founded upon reasons of social policy, and therefore those statutes which abolish the disqualification arising from interest do not always remove the common-law incompetency of husbands and wives to testify for or against each other.[15] The exception to the

[14] Ste. Dig., art. 108; 1 Gr. Ev., § 343; Tay. Ev., § 1371; 1 Whar. Ev., § 422; 2 Elliott Ev., § 732.

[15] Lucas v. Brooks, 18 Wall., 436, 452; Stickney

rule above stated is made upon the ground of necessity, for otherwise it would be ordinarily practically impossible to secure convictions in such cases.[16] In many of the states, however, the incompetency of husbands and wives to testify for or against each other has been to a greater or less degree removed by statute; and although these statutes vary in their provisions, the general tendency of such legislation is to put them upon the same footing with other witnesses in civil cases (excepting as to confidential communications to each other), and in criminal cases to make them competent, but not compellable to testify for or against each other.

§ 93. Witnesses forbidden to testify as to certain matters and privileged as to others.— In addition to the general disqualifications above enumerated, witnesses are for reasons of public policy, forbidden by law to testify as to certain matters affecting other persons towards whom they stand in special relations, or affecting the public administra-

v. Stickney, 131 U. S., 227, 236; Gee v. Scott, 48 Texas, 510, 526; 26 Am. R., 331; Spitz's Appeal, 56 Conn., 184; 14 A., 76; 8 Am. St. R., 303; 1 Gr. Ev., § 334; 1 Starkie, Ev., *142; 1 Whar. Ev., § 430.

[16] 1 Gr. Ev., § 343.

tion of justice; and they are also *privileged* to decline answering certain questions, the answers to which might be injurious to the public or to the witness himself. These matters will now be considered separately.

§ 94. Confidential communications between husband and wife.—No husband is permitted to disclose any confidential communication made to him by his wife, nor is any wife permitted to disclose any confidential communication made to her by her husband, during the marriage. This prohibition having been made for the purpose of preserving intact the confidence and security of the marriage state, is not removed by the death of one of the parties or by a dissolution of the marriage. It is personal to the parties, and does not extend to communications made in the presence or hearing of third persons capable of understanding them.[17]

§ 95. Judges may not be examined as to certain matters.—A judge may not be sworn

[17] 1 Gr. Ev., §§ 254, 336-338; 1 Whar. Ev., § 427; Allison v. Barrow, 3 Cold., 414; 91 Am. R., 291; Dickerman v. Graves, 6 Cush., 308; 53 Am. D., 41; Com. v. Sapp, 90 Ky., 580; 14 S. W., 834; 29 Am St. R., 405; Hopkins v. Grimshaw, 165 U. S., 342, 347; 1 Elliott Ev., §§ 628-632.

as a witness in any case while presiding at the trial, for in such a case he could hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of other witnesses.[18] Where there are several judges sitting together, any one or more of them may be sworn and testify as witnesses; but as soon as they become witnesses they should leave the bench and take no further judicial part in the trial.[19] Neither may judges or justices of the peace be asked to disclose anything that took place at their consultations, for the law holds these to be inviolable upon grounds of public policy; but they may be examined as to foreign and collateral matters which happened in their presence while the trial was pending or after it was ended,[20] and also as to anything which took place before them at a trial, not forming part of the record, and

[18] 1 Gr. Ev., § 364; Tay. Ev., § 1379; 1 Whar. Ev., § 600; People v. Miller, 2 Park. C. R., 197, 200; Morss v. Morss, 11 Barb., 510; Rogers v. State, 60 Ark., 76; 29 S. W., 894; 48 Am. St. R., 154; 31 L. R. A., 465.

[19] 1 Gr. Ev., § 364; Tay. Ev., § 1379; People v. Dohring, 59 N. Y., 374; 17 Am. R., 349.

[20] 1 Gr. Ev., § 364; Tay. Ev., § 859; 1 Whar. Ev., § 600; 1 Elliott Ev., § 643.

which may be necessary in order to identify the case or prove the testimony of a witness.[21]

§ 96. Grand and petit jurors may not be examined as to their consultations.—For the same reason that the consultations of judges are held inviolable, petit jurors may not give evidence of what passed between them in the discharge of their duties;[22] but they are competent to testify as to the issues actually passed on by the jury of which they were members, when such question is material on a subsequent trial.[23] There has been some conflict of opinion as to how far this rule of inviolability extends to the proceedings of grand jurors; but it appears to be now generally held in this country, that while a grand

[21] 1 Whar. Ev., § 600; 1 Gr. Ev., § 364; Tay. Ev., § 938; Heyward's Case, 1 Sandf., 731, 734; Jackson v. Humphrey, 1 Johns., 498; Welcome v. Batchelor, 23 Me., 85, 88.

[22] 1 Whar. Ev., § 601; 1 Gr. Ev., § 252a; Tay. Ev., § 945; Cluggage v. Swan, 4 Binn., 150, 155; 5 Am. D., 153; Studley v. Hall, 22 Me., 198, 201; Hannum v. Belchertown, 19 Pick., 311, 313.

[23] 1 Whar. Ev., § 601; Piatt v. Sinclair, 6 Ohio, 227, 234; Follansbee v. Walker, 74 Pa. St., 306, 310; Stapleton v. King, 40 Iowa, 278, 284. But see Packet Co. v. Sickles, 5 Wall., 580, 593; Hewitt v. Chapman, 49 Mich., 4; 12 N. W., 888.

juror may not give evidence to impeach the finding of his fellows, or even to show what was the vote of the findings, he can be required to give evidence as to what was the issue before the grand jury, or what was the testimony of particular witnesses, whenever such matters are material; and also as to whether twelve of them actually concurred in the finding of a bill.[24] A petit juror may be sworn and examined as a witness in a case which he has been impaneled to try, and under such circumstances he need not leave the box or decline to interfere with the verdict, for he does not decide upon the admissibility of his own testimony, and there are eleven others besides himself to weigh its credibility.[25]

[24] 1 Whar. Ev., § 601; 1 Gr. Ev., § 252; Tay. Ev., §§ 942, 943; Ste. Dig., art. 114; Izer v. State, 77 Md., 10; 26 A., 282; Low's Case, 4 Me., 439; 16 Am. D., 271; People v. Hurlbut, 4 Denio, 133, 135; 47 Am. D., 244; Com. v. Green, 126 Pa. St., 531; 17 A., 878; 12 Am. St. R., 915; United States v. Charles, 2 Cr. C. C., 76; 25 Fed. Cas., p. 409.

[25] Tay. Ev., § 1379; Best Ev., § 187; 1 Whar. Ev., § 602; R. v. Rosser, 7 C. & P., 648; Manly v. Shaw, C. & Marsh. 361; State v. Powell, 2 Halstead, 244; Howser v. Com., 51 Pa. St., 332; Ottawa Gaslight Co. v. Graham, 28 Ill., 73; 81 Am. D., 263.

§ 97. Communications made to public officers or grand jurors, with a view to criminal prosecutions. may not be disclosed.—So, also upon grounds of public policy, all communications made to public officers and to grand jurors, with a view to the prosecution or detection of suspected offenders, are privileged, and no witness is permitted to divulge any such communication, or the name of the person who made them, without the consent of such person.[26]

§ 98. State secrets may not be disclosed.—No witness will be permitted to be examined relating to any state secret, or to communications with public officers about matters pertaining to their official duties, in so far as such examination would, in the opinion of the court, make disclosures injurious to the public interests. And in all cases where the law is restrained by public policy from enforcing the production of papers, no secondary evi-

[26] 1 Gr. Ev., § 250; Tay. Ev., §§ 939-43; Ste. Dig., art. 113; 1 Whar. Ev., §§ 603, 604; Oliver v. Pate, 41 Ind., 132, 141; Worthington v. Scribner, 109 Mass., 487, 488; 12 Am. R., 736; United States v. Moses, 4 Wash. C. C., 726; 27 Fed. Cas., p. 5; In re Quarles, 158 U. S., 532, 536; 1 Elliott Ev., § 630.

dence of the contents of such papers may be given.[27]

§ 99. Parties to negotiable instruments incompetent to impeach them.—In the courts of the United States, and of several of the states of the Union, it has been held that parties to a negotiable instrument who have given it credit and currency by their signatures are not afterwards competent witnesses, even in suits between other persons, to impeach its validity; but in other states such parties are held competent to testify in suits between other persons, where their evidence cannot be excluded upon the ground of estoppel.[28]

[27] Ste. Dig., art. 112; 1 Gr. Ev., § 251; 1 Whar. Ev., 604. See, also, § 103, *post;* Totten v. United States, 92 U. S., 105; Marbury v. Madison, 1 Cr., 137; 144; Worthington v. Scribner, 109 Mass., 487.

[28] Mr. Justice Miller, in Sweeny v. Easter, 1 Wall., p. 173, says: "Perhaps no subject connected with commercial paper has been more the subject of controversy, and of opposing and well-balanced judicial decisions, than the proposition here relied on. It was first laid down in the English case of Walton v. Shelley (1 Term R., 296), and afterwards held the other way in Jordaine v. Lashbrook (7 Id., 601). This court has steadily adhered to the doctrine of Walton v. Shelley, and we are referred by counsel for plaintiff in error to our own decisions on the subject in 6 Peters,

§ 100. Communication to legal adviser may not be disclosed by him.—Upon principles of public policy, no lawyer is permitted, unless with his client's express consent, to testify as to any communication, oral or documentary, made to him by or on behalf of his client during the course and for the purpose of his employment;[29] for otherwise no man would dare to consult a professional adviser with a view to his defense or to the enforcement of

51; 8 Peters, 12; 3 Howard, 73; 13 Howard, 229." The courts in the following states, viz., Maine, Massachusetts, Pennsylvania, Mississippi, Louisiana, Ohio, Illinois, Iowa, and Tennessee, have also adopted the rule in Walton v. Shelley, which, however, is rejected in the states of Vermont, New Hampshire, Connecticut, New York, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Michigan, Kentucky, and Missouri. The best collection of the cases on the point will be found in 22 Am. Rep., p. 93, in a note to Dewey v. Merriam, 71 Ill., 198. Most of these are also given in the note to § 385 of 1 Greenleaf on Evidence. See 2 Elliott Ev., § 739.

[29] Ste. Dig., art. 115; 1 Gr. Ev., §§ 237-242; Tay. Ev., §§ 911-915; 1 Whar. Ev., §§ 576-581; Chirac v. Reinecker, 11 Wheat., 280, 294; McLellan v. Longfellow, 32 Me., 494; 54 Am. D., 599; Bacon v. Frisbie, 80 N. Y., 394; 36 Am. R., 627; Snow v. Gould, 74 Me., 54; 43 Am. R., 604; 1 Elliott Ev., § 623.

his rights, and no man could safely come into court either to obtain redress or to defend himself.[30] This rule being restricted to information given in the course and for the purpose of professional employment, does not apply to any fact which a legal adviser became acquainted with otherwise than in his character as such;[31] nor to any communication made to him in furtherance of any criminal purpose,[32] or to any fact observed by him in the course of his employment, showing that any crime or fraud has been committed since the commencement of his employment; for it is no part of a lawyer's duty to be an accessory to his client's crime or a participant in his fraud.[33] This rule is restricted to communications made to counsel, solicitors or

[30] 1 Gr. Ev., § 238; Tay. Ev., § 914; Greenough v. Gaskell, Myl. & K., 103; 1 Elliott Ev., § 624.

[31] Ste. Dig., art. 115; 1 Gr. Ev., § 244; Tay. Ev., § 930; Chirac v. Reinecker, 11 Wheat., 280, 284; Crosby v. Berger, 11 Paige, 377; 42 Am. D., 117; Coveney v. Tannahill, 1 Hill, 35; 37 Am. D., 289.

[32] Ste. Dig., art. 115; Tay. Ev., § 931; Reg. v. Cox, L. R., 14 Q. B. D., 164, per Stephen, J.; Alexander v. United States, 138 U. S., 353, 357; People v. Blakely, 4 Park. C. R., 176, 180; Bank of Utica v. Mersereau, 4 Barb. Chy., 528, 598; 49 Am. D., 189, 230.

[33] Ste. Dig., art. 115; 1 Gr. Ev., § 242; Tay. Ev.,

attorneys who are acting for the time being in the character of legal advisers, and to such other persons as are the necessary organs of communication between them and their clients, such as their clerks and interpreters.[34] It does not, at common law, apply to communications made to clergymen or medical men in their professional capacity;[35] but in some of the United States such communications are privileged by statute.

§ 101. Privilege of client as to disclosing communication made to legal adviser.—Besides these matters as to which certain witnesses are forbidden to testify, there are others which they are privileged to refuse to be interrogated about, if they choose to avail

§ 930, note; 1 Whar. Ev., § 590; Follette v. Jeffereyes, 1 Sim. (N. S.), 3, 17.

[34] Ste. Dig., art. 115; 1 Gr. Ev., § 239; Tay. Ev., § 920; 1 Whar. Ev., § 582; Jackson v. French, 3 Wend., 337, 339; 20 Am. D., 697; Sibley v. Waffer, 16 N. Y., 180, 183. As to conveyancers, see De Wolf v. Strader, 26 Ill., 255; 79 Am. D., 371; Hatton v. Robinson, 14 Pick., 416; 25 Am. D., 415; Hubbard v. Houghton, 70 N. Y., 54. But see Crane v. Barkdoll, 59 Md., 534, 538; 1 Elliott Ev., § 625.

[35] Ste. Dig., art. 117; 1 Gr. Ev., § 247; Tay. Ev., § 916; 1 Whar. Ev., §§ 596, 606; Com. v. Drake, 15 Mass., 161; Simon v. Gratz, 2 Pa. R., 412.

themselves of such privilege, upon the ground that disclosures in regard to such matters might be injurious to the interests of the witness or of the public. Among these may be classed all communications made by a client to his legal adviser, which such legal adviser would not be allowed to disclose without the client's permission, although they may have been made before any dispute arose as to the matter referred to.[36]

§ 102. Privilege as to facts tending to criminate witness.—In accordance with the common-law principle which has been incorporated in the federal constitution,[37] and also made a part of the fundamental law of the several states of the Union, that no person

[36] Ste. Dig., art. 116; 1 Gr. Ev., § 239a; Tay. Ev., § 924; 1 Whar. Ev., § 583. In Massachusetts it has been held that when the client, being a party to the cause, has testified as a witness on his own offer, he thereby waives the privilege and may be compelled to disclose, on cross-examination, any communications made by him to his legal adviser. Inhabitants of Woburn v. Henshaw, 101 Mass., 193, 200; 3 Am. R., 333. But the contrary has been held in other states. Hemenway v. Smith, 28 Vt., 700, 707; Bigler v. Reyher, 43 Ind., 112; State v. White, 19 Kan., 445; 27 Am. R., 137; 1 Elliott Ev., §§ 625, 627.

[37] Const. U. S., Amend. V.

shall be compelled in any criminal case to be a witness against himself, every witness is privileged to decline answering any question, if the answer thereto might, in the opinion of the judge, have a tendency to expose such witness (or his or her wife or husband) to any criminal charge, or to any penalty or forfeiture, which the judge regards as reasonably likely to be preferred or sued for;[38] or to be compelled to produce any document which would have a like effect, but this privilege does not excuse a witness from answering any question material to the issue, merely because the answer may establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the state or of any other person,[39] or because the answer thereto may have a tendency to disgrace or degrade him, without rendering him liable to any criminal

[38] Ste. Dig., art. 120; 1 Gr. Ev., § 451; Tay. Ev., §§ 1453, 1454; 1 Whar. Ev., §§ 533-541; Counselman v. Hitchcock, 142 U. S., 547; Fries v. Brugler, 7 Halst., 79; 21 Am. D., 52; Chamberlain v. Wilson, 12 Vt., 491; 36 Am. D., 356; Calhoun v. Thompson, 56 Ala., 166; 27 Am. R., 754; Ballman v. Fagin, 200 U. S., 186, 195; 2 Elliott Ev., § 1001.

[39] Ste. Dig., art. 120; Tay. Ev., § 1463; Bull v. Loveland, 10 Pick., 912; Taney v. Kemp. 4 H. & J., 345; 7 Am. D., 673; 2 Elliott Ev., § 1009.

prosecution.[40] This privilege, however, may be waived by the witness if he voluntarily testifies to any matter which might expose him to a criminal prosecution; for in such case he is bound to give all the details of the transaction, if required. Parties to the cause who testify on their own offer are considered as thereby waiving the privilege as to the subject-matter of their testimony in chief, and must submit to a full cross-examination thereon, however much the answers may tend to criminate them.[41] As to how far a witness may be compelled to submit to a physical examination see Sec. 131 *post.* The privilege against self-incrimination is purely

[40] 1 Gr. Ev., § 454; Tay. Ev., §§ 1459, 1460; 1 Whar. Ev., § 542; People v. Mather, 4 Wend., 229, 250-254; 21 Am. D., 122; Lohman v. People, 1 N. Y., 379; 49 Am. D., 340; People v. Sharp, 107 N. Y., 427; 14 N. E., 319; 1 Am. St. R., 857; act Cong., 1906, c. 389: 2 Elliott Ev., § 1005.

[41] 1 Gr. Ev., § 451a; 1 Whar. Ev., § 539; 1 Thomp. Tr., § 307; Spies v. Illinois, 123 U. S., 131, 180; Com. v. Nichols, 114 Mass., 285; 19 Am. R., 346; State v. White, 19 Kan., 45; 27 Am. R., 137; State v. Duncan, 7 Wash., 336; 35 P., 117; 38 Am. St. R., 888, and note. Fitzpatrick v. United States, 178 U. S., 304, 5; Sawyer v. United States, 202 U. S., 150, 165; 2 Elliott Ev., § 1012.

personal to the witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer.[42]

§ 103. Privilege of government and state officials as to public matters.—The executive of the nation or of a state and the heads of departments of the government are privileged, in the exercise of their discretion, to determine how far they will produce papers or answer questions as to public affairs in a judicial inquiry; this privilege, however, is restricted to these officers and cannot be claimed by a subordinate.[43]

§ 104. Cases where corroborative evidence required.—Besides the above cases in which certain witnesses are either disqualified or privileged from testifying, there are other cases in which the testimony of a witness, although admissible, is not sufficient to form the basis of a verdict unless supported by other corroborative evidence. These will now be briefly considered.

[42] Hale v. Henkel, 201 U. S., 43, 70; see Vol. 5, Cent. Dig. Witness, §§ 1058-1060.

[43] 1 Gr. Ev., § 251; 1 Whar. Ev., § 604; Totten v. United States, 92 U. S., 105; Marbury v. Madison, 1 Cr., 137, 144; Worthington v. Sribner, 109 Mass., 487; 12 Am. R., 736; 1 Elliott Ev., § 639.

§ 105. Prosecutions for treason.—The first case is that of prosecutions for treason, in which the testimony of two witnesses is always required. The federal constitution provides [44] that no person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or on confession in open court. But a person may be convicted of treason against a state (where there is no express law to the contrary) by the testimony of two witnesses, one of them to one, and another to another, overt act of the same treason, or both of them to a voluntary confession out of court.[45]

§ 106. Prosecutions for perjury.—If, upon a trial for perjury, the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted,[46] for the reason that the oath of a single witness is not deemed

[44] Const. U. S., art. III, § 3.

[45] 1 Gr. Ev., § 255; 3 id., § 246; 7 and 8 Will. III, c. 3, §§ 2, 4.

[46] Ste. Dig., art. 122; 1 Gr. Ev., § 257; United States v. Wood, 14 Pet., 430, 440; 4 Ell. Ev., § 3089.

sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence by which it is supported.

§ 107. To contradict answer in equity called for upon oath.—So, also, the general rule in equity is that where the complainant, by calling on a defendant to answer under oath an allegation which he makes, thereby admits the answer to be evidence, and the defendant in express terms negatives that allegation, either the testimony of two witnesses, or of one witness with corroborative circumstances, will be required to outweigh such an answer. Cases, however, sometimes occur when the evidence arising from circumstances is of itself strong enough for this purpose.[47]

§ 108. Generally required to establish general usage or proof of adultery.—The testimony of more than one witness is usually required to establish any usage of trade of which all dealers in that particular line are bound to take notice and presumed to be informed.[48] And courts will not ordinarily

[47] 1 Gr. Ev., § 260; Tay. Ev., § 959; Clark's Ex'r v. Van Reimsdyk, 9 Cr., 153, 160; Tobey v. Leonards, 2 Wall., 423, 430.

[48] 1 Gr. Ev., § 260a; 2 Whar. Ev., § 964; Boardman

grant divorces upon the evidence of the parties alone without some corroborative proof, upon the ground that, whenever other testimony can be had, it is neither safe nor fit to rely upon that of the party alone.[49] These, however, are only general rules of practice, without the binding authority of law, and may be departed from by the courts at any time in their discretion.

§ 109. Testimony of an accomplice should generally be corroborated to warrant conviction.—When the only proof against a person charged with a criminal offense is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so; but it is questionable whether the failure of the judge to so warn the jury is sufficient ground for granting a new trial.[50]

v. Spooner, 13 Allen, 359; Robinson v. United States, 13 Wall., 366.

[49] Robins v. Robins, 100 Mass., 150; 1 Whar. Ev., § 433.

[50] Ste. Dig., art. 121; 1 Gr. Ev., § 380; Tay. Ev., §§ 967-971; Cheatham v. State, 67 Miss., 335; 7 So., 204; 19 Am. St. R., 310; Com. v. Price, 10 Gray, 472; 71 Am. D., 665. But see Blakely v. State, 24 Tex. Ap., 616; 7 S. W., 233; 5 Am. St. R., 912.

CHAPTER IV.

EXAMINATION OF WITNESSES.

§ 110. All witnesses must be examined upon oath or affirmation.—All oral evidence must be given upon oath, unless the witness objects to being sworn from alleged conscientious scruples, in which case he will be allowed to make a solemn religious affirmation, involving a like appeal to God, for the truth of his testimony, in any mode which he shall declare to be binding upon his conscience; and any person who, having made such affirmation, wilfully and corruptly gives false evidence, is punishable as for perjury. All witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences; and if the witness be not of the Christian religion, the court will inquire as to the form in which an oath is administered in his own country or among those of his own faith, and will impose it in that form. In ascertaining what form of oath is binding upon the conscience of the witness,

the court may inquire of the witness himself, and the proper time for making this inquiry is before he is sworn.[1]

§ 111. How oral evidence may be taken.— Oral evidence must be taken either in open court, or out of court for future use in court under a commission or by deposition before some officer of the court or other person or persons appointed for that purpose, either by agreement of the parties or under the provisions of some statute or rule of court governing the tribunal in which said evidence is to be used. If taken under a commission, it must be done in the manner prescribed by its terms, or by the rules of court or statute regulating the mode of executing it; and if taken by deposition, it must be only in the manner and under the circumstances prescribed, and can be used only for the purposes and upon the contingencies expressly provided by the terms of such agreement, statute or rule of court. The testimony of witnesses who are beyond the reach of the process of the court, or who, from sickness or any other

[1] 1 Gr. Ev., § 371; 1 Whar. Ev., § 387; Omichund v. Barker, 1 Sm. Lead. Cas., 7th Am. ed., pp. *535, *545; 1 Thomp. Tr., § 365; 2 Elliott Ev., § 805.

reason, are physically unable to attend court,[2] and (unless otherwise provided by statute) all testimony in chancery proceedings,[3] may be taken either under a commission or by deposition, according to the practice of the court before which the case is tried.[4] All other testimony must be given orally in open court, except in cases otherwise specially provided for by statute or rule of court or agreement of parties. In civil cases, when witnesses are about to leave the jurisdiction of the court, or, by reason of feeble health or advanced age, are not likely to be alive and capable of testifying at the time of trial, their testimony may be taken by deposition for future use *de bene esse* in the event of it being impossible for them to give their evidence in court at the hearing; provided the party taking such depositions shall have first given such notice as may be required by statute or rule of court to the party against whom such depositions are to be used.[5]

[2] 1 Gr. Ev., § 321.

[3] id., §§ 251, 259.

[4] Practice in Courts of United States; Blease v. Garlington, 92 U. S., 1; Nelson v. United States, 201 U. S., 92.

[5] 1 Gr. Ev., §§ 321-325. See Rev. Stats. U. S., § 863, etc.; 2 Elliott Ev., §§ 1136-1200.

§ 112. When and how objections to evidence may be made.—When a deposition or the return of a commission is used in court as evidence, the party against whom it is read may object to the reading of anything therein, on any ground upon which he could have objected to its being stated by a witness examined in open court;[6] but no one can object to the reading of the answer of any question asked by his own representative, unless upon the ground of its being irresponsive to such question;[7] and no question may be objected to for matter of form merely, unless exception was taken thereto before it was answered, in cases where the party objecting or his representative had the opportunity of so excepting.[8]

All objections to the admissibility of oral evidence should be made at the time it is offered, when apparent, otherwise they must be made within a reasonable time after they

[6] Ste. Dig., art. 125; Scaggs v. B. & W. R. R., 10 Md., 268, 281.

[7] Mayfield v. Kilgour, 31 Md., 240, 243; Packham v. Glendemeyer, 102 Md., 416, 424; 63 A., 1048.

[8] Strickler v. Todd, 10 S. & R., 63, 73; 13 Am. D., 649; Doane v. Glenn, 21 Wall., 32, 35; Brown v. Hardcastle, 63 Md., 484, 494; 1 Thomp. Tr., § 701.

are disclosed to the party making them;[9] for a party who sits by and allows his adversary to put in evidence which he knows to be incompetent, without objecting when he has the opportunity to do so, will ordinarily be deemed to have waived all objections to it, and the evidence thus received will be allowed to have the same effect as if admitted according to the strict rules of law.[10] Thus objection to the competency of a witness should be made before he is sworn, or at least before he has testified—although when the opposite party does not become aware of the incompetency until the witness has begun his testimony, objection may then be made,

[9] Dent v. Hancock, 5 Gill, 120, 127; Marsh v. Ward, 35 Md., 123; Maxwell v. Hannibal, etc., R. R. Co., 85 Mo., 95, 108; Gerting v. Wells, 103 Md., 624, 628; 64 A., 298, 433.

[10] Farmers' Bank v. Duvall, 7 G. & J., 78, 95; Atwell v. Grant, 11 Md., 101, 107; Deutsch v. Bond, 46 Md., 164; Lamb v. Taylor, 67 Md., 93; 8 A., 760; Sentman v. Gamble, 69 Md., 304, 305; 13 A., 58; 14 A., 673; Slingluff v. Builder's Supply Co., 89 Md., 557, 562; 43 A., 759; Maxwell v. Hannibal, etc., R. R. Co., 85 Mo., 95, 108; Cleveland, etc., R. R. Co. v. Wyant, 134 Ind., 681; 34 N. E., 569; Winter v. Winter, 102 Iowa, 53; 71 N. W., 184; 63 Am. St. R., 428.

and if sustained the testimony already given will be stricken out.[11] If a question be put which is leading or otherwise objectionable in form, or which plainly calls for inadmissible testimony to be given in answer thereto, objection should be made to such question before it is answered.[12] But if the question be one which does not necessarily call for incompetent testimony, but such testimony is in fact given in reply thereto, objection should be made not to the question but to the answer or such part thereof as may be incompetent or irrelevant as soon as such incompetency or irrelevancy shall become apparent.[13] Thus if a witness be asked whether there was a contract between the plaintiff and the defendant and what it was and his answer discloses for the first time that the al-

[11] 1 Gr. Ev., § 421; 1 Whar. Ev., § 393; Tay. Ev., § 1392; Hickory v. United States, 151 U. S., 303, 307; André v. Bodman, 13 Md., 241; 71 Am. D., 628; 2 Elliott Ev., § 881.

[12] Williams v. Grand Rapids, 53 Mich., 271; 18 N. W., 811; Levin v. Russell, 42 N. Y., 250, 256; Wiggins v. Guthrie, 101 N. C., 661; 7 S. E., 761.

[13] Gould v. Day, 94 U. S., 405, 419; Holms v. Roper, 141 N. Y., 64; 36 N. E., 180; Denise v. Denise, 110 N. Y., 562; 18 N. E., 368.

leged contract was in writing, the opposing counsel may at once require the witness to produce the writing and if he fails to do so, or to give a satisfactory excuse for its non-production, any testimony which he may have already given as to the terms of such contract will be stricken out.[14] When a question calls for evidence that may or may not be competent, the opposing counsel has a right to interpose and cross-examine the witness upon facts material to the competency of his proposed answer;[15] and when a question calls for evidence which may or may not be relevant the party putting it may be required to state beforehand the substance of what he expects to prove by the witness in order that its admissibility may be determined.[16] Improper evidence admitted on one side without objection does not give the other side the right to introduce in reply the same kind of

[14] Common practice at nisi prius. Mt. Vernon Brewing Co. v. Tucker, 108 Md., 158, 162; 69 A., 702.

[15] Maurice v. Worden, 54 Md., 230; Trussell v. Scarlett, 18 Fed. Rep., 217 and note.

[16] Morgan v. Brown, 71 Pa. St., 130, 136; Susquehanna Fertilizer Co. v. White, 66 Md., 435; 7 A., 802; 59 Am. Rep., 186, 189; Bauernschmidt v. Md. Trust Co., 89 Md., 507, 570; 43 A., 790.

evidence if objected to;[17] but the court has a discretionary power when one side has so given immaterial or irrelevant evidence without objection to permit the other side to contradict it.[18] But whenever improper evidence has been received against the objection of the opposing party, it is error for the court to refuse to allow the latter to contradict it,[19] yet the court has the right to exclude *suâ sponte* evidence which is clearly inadmissible though not objected to or excepted to by either party.[20]

§ 113. Examination in chief — Leading questions.—When a witness has been duly sworn, he must be first examined in chief by questions propounded on behalf of the party who called him. This examination must re-

[17] Stringer v. Young's Lessee, 3 Pet., 320, 325; People v. Dowling, 84 N. Y., 478, 486; Blossom v. Barnett, 37 N. Y., 438; 97 Am. Dec., 747; Higgins v. Carlton, 28 Md., 105; 92 Am. D., 666, 671; Manning v. Burlington, 64 Iowa, 240; 20 N. W., 169.

[18] Farmers' Bank v. Whinfield, 24 Wend., 419, 425; Waldron v. Romaine, 22 N. Y., 368, 371; Furbish v. Goodwin, 25 N. H., 425, 447.

[19] Lake Roland Ry. Co. v. Weir, 86 Md., 273; 37 A., 714.

[20] B. & O. R. R. Co. v. State use of Block, 107 Md., 642, 657; 69 A., 439; 72 A., 340.

late to facts in issue or relevant thereto; and all leading questions, *i. e.*, such as suggest the answer which the person putting them wishes or expects to receive, or suggest disputed facts as to which the witness is to testify, must not be asked if objected to by the adverse party, except with the permission of the court. This should always be given when the witness is evidently hostile to the party calling him, or reluctant to give evidence, or when omissions in his testimony are plainly caused by want of recollection which a suggestion may assist.[21] A witness under examination will not be permitted to obtrude irrelevant matter in answer to a question not relating to it, and if he should attempt to do so, such answer may, upon application of either party, be excluded from the evidence; for otherwise an adverse witness might seriously injure the case of the party who called him, or a too friendly one might introduce matters foreign to the question and unfavorable to the other side. If, however, the ex-

[21] Ste. Dig., art. 128; 1 Gr. Ev., § 435; Tay. Ev., §§ 1404, 1405; Turney v. State, 8 Sm. & Marsh., 104; 47 Am. D., 84; Barton v. Kain, 17 Wis., 38; 84 Am. D., 728; Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 657; 49 N. W., 65; 31 Am. St. R., 507.

amining party fails to have such irresponsive answer excluded as irrelevant, his adversary has the option of either doing so himself, or treating it as evidence and cross-examining upon it. This rule applies also to irrelevant answers to questions put on cross-examination, which, unless the person cross-examining applies to have them stricken out, may be made the subject of re-examination by the other side.[22]

§ 114. Refreshing memory.—A witness, while under examination, may refresh his memory by referring to any writing made by himself at the time of the transaction about which he is testifying, or so soon afterwards that the judge considers it to have been then fresh in his memory, or by any writing made by any other person which he examined within the time aforesaid and then knew to be correct.[23] If the witness can testify positively to its accuracy, such writing may itself be put in evidence.[24] A witness may not use

[22] 1 Starkie Ev., p. *216; 1 Gr. Ev., § 468; Tay Ev., § 1475; 1 Thomp. Tr., § 718; Abb. Tr. Bf., p. 62; Brashears v. Orme, 93 Md., 541; 49 A., 620.

[23] Ste. Dig., art. 136; Tay. Ev., §§ 1406-1410; 1 Gr. Ev., §§ 436-438; 1 Thomp. Tr., § 398, etc.

[24] 1 Gr. Ev., § 437, note 3; Insurance Co. v. Weides,

for this purpose a copy of such writing, unless, after he has refreshed his memory by looking at it, he can swear to a distinct recollection of the matters contained in it, independently of the paper.[25] The reason for this distinction is, that whenever the witness' testimony is in any degree dependent upon the contents of a writing, the existence and genuineness of such writing become important factors in estimating the weight to be given to his testimony, and must therefore be established by the best evidence, which is the production of the original paper; but of course this is not applicable to cases where the matters, after having been recalled to mind, are recollected perfectly, and without reference to the means by which they are so recalled. It appears to be somewhat upon this principle that expert witnesses are permitted to refresh their memory by referring to professional treatises.[26] Whenever a witness uses any document to refresh his mem-

9 Wall., 677-680; S. C., 14 Wall., 375-380; Ruch v. Rock Island, 97 U. S., 693-695; 2 Elliott Ev., § 872.

[25] 1 Gr. Ev., §§ 436, 437; Tay. Ev., §§ 1408, 1409; Hill v. State, 17 Wis., 675, 679; 86 Am. D., 936.

[26] Tay. Ev., § 1422; Ste. Dig., art. 136; Rippon v. Bittel, 30 Wis., 614; Harvey v. State, 40 Ind., 516.

ory, the adverse party has a right to inspect it, and cross-examine him upon it; not only that he may test its genuineness and admissibility for the purpose intended, but also that he may have the benefit of the witness refreshing his memory by every part of it. When, however, a paper which has been shown to a witness for the purpose of refreshing his memory does not have that effect, the adverse party has no such right to inspect it, for there would be no object to be gained by his so doing.[27]

§ 115. Cross-examination — Questions affecting credibility — Leading questions.— Whenever a witness has been examined, the opposite party always has a right to cross-examine him; and in case a witness dies, or becomes incapable of being further examined before an opportunity for his cross-examination has been afforded to the party against whom his evidence is to be used, the testimony already given must be excluded.[28] The cross-examination must be confined to the facts and

[27] Tay. Ev., § 1413; 1 Gr. Ev., §§ 437, note 3, 466; Ste. Dig., art. 137; 1 Whar. Ev., § 525; Rosc. Ev. N. P., 185; 2 Elliott Ev., § 903.

[28] 1 Gr. Ev., § 445, note 2; Kissam v. Forrest, 25 Wend., 651; People v. Cole, 43 N. Y., 508.

circumstances connected with the matters stated by the witness in his direct examination, and to questions tending to test his accuracy, veracity or credibility, or to shake his credit by injuring his character.[29] The witness may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, if, in the opinion of the judge, such question be material to affect the credibility of his testimony, and unless it be such that the answer might have a tendency to render the witness liable to some criminal prosecution, penalty or forfeiture, as explained in sec. 102, *ante*.[30]

[29] 1 Gr. Ev., § 445; 1 Whar. Ev., § 529. But this limitation is not applied in several of the states, as Massachusetts, New York, Ohio, Alabama, Mississippi, Missouri and Michigan; 2 Elliott Ev., § 917, etc.

[30] Ste. Dig., art. 126; 1 Gr. Ev., §§457-460; 1 Whar. Ev., §§ 529-548; Carroll v. State, 32 Texas Cr. R., 401; 24 S. W., 100; 40 Am. St. R., 786. There has been considerable conflict of authority in this country [see 1 Gr. Ev., § 457; Newcomb v. Griswold, 24 N. Y., 298; contra, State v. March, 1 Jones' (N. C.) L., 526; and State v. Garrett, Busb. (N. C.) L., 327], as to whether, if objection be made, a witness can be asked if he has been previously convicted of any crime or misdemeanor, inasmuch as the record of the judg-

Subject to this exception, the party cross-examining has a right to ask and require an answer to any question concerning the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used

ment is the best evidence of such conviction; but this technicality does not necessarily stand in the way of his being asked whether he has ever been in jail or the penitentiary, and if so, how long he has been there. Real v. People, 42 N. Y., 270-280; 1 Whar. Ev., § 541, note. The modern tendency, however, is to allow such questions and to require an answer to them when they appear to be put for the purpose of honestly discrediting the witness. Whar. Cr. Ev., § 474; State v. Bacon, 13 Oreg., 143; 9 P., 393; 57 Am. Rep., p. 8, and cases cited in note, p. 16. Also, Com. v. Racco, 225 Pa. St., 113, 116; 73 A., 1067; 133 Am. St. R., 872. In England it has been provided by statute (28 and 29 Vic., c. 18, § 6) that a witness may be questioned as to whether he has been convicted of any felony or misdemeanor; and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction by a certificate of the clerk of the court where he was convicted. Tay. Ev., § 1434.

those means, and his powers of discernment, memory and description; for it is the purpose of cross-examination to investigate, ascertain and submit all such matters to the consideration of the jury before whom the witness has testified, in order that they may have an opportunity of observing his demeanor and determining the just weight and value of his testimony.[31]

The extent to which a witness may be cross-examined as to matters that are only relevant in so far as they may shake his credit by injuring his character is a matter confided to the discretion of the judge who presides at the trial;[32] and as the exercise of this discretion is not subject to review on appeal, except in cases of plain abuse and injustice,[33] he should never compel a witness to answer, or even allow him to be asked, vexatious or degrading questions, unless, under the peculiar circumstances of the case, the ends of justice appear to require it.[34] In criminal

[31] 1 Stark. Ev., p. *195; 1 Gr. Ev., § 446; Tay. Ev., §§1460, 1461; 1 Whar. Ev., § 545.

[32] Gr. Western Turnpike Co. v. Loomis, 32 N. Y., 127, 132; Storms v. United States, 94 U. S., 76, 85.

[33] Johnston v. Jones, 1 Black (U. S.), 210, 226.

[34] Probably the best rule for the exercise of this

cases when the accused is a witness and the judge permits questions to be put to him on cross-examination which have no bearing upon the charge on which he is being tried, and do not legitimately tend to impeach his credibility, but may prejudice the mind of the jury against him, a judgment of conviction will be reversed on appeal.[35] Leading questions are generally permitted on cross-ex-

discretion is that given in § 148 of the Indian Evidence Act of 1872, which provides:

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence. See Ste. Dig., note XLVI.

[35] People v. Crapo, 76 N. Y., 288; 32 Am. Rep., 302; but see Jackson v. State, 33 Tex. Cr. R., 281; 26 S. W., 194, 622; 47 Am. St. R., 30.

amination, upon the theory that the witness is presumably favorably inclined towards the party who called him;[36] but as the judge may permit them in the direct examination when the witness is evidently hostile to the party who called him, so he may prohibit them on cross-examination when the witness shows a strong interest or bias in favor of the cross-examining party.[37] Especially is this the case when a party to the suit is examined as a witness by his adversary, where the examination in chief should be governed by the rules applicable to a cross-examination, and the cross-examination should be conducted as a re-examination. This would seem to be the correct rule upon principle, although there does not appear to be any reported decision directly bearing upon the point.

§ 116. How far answers on cross-examination may be contradicted.—When a witness under cross-examination has been asked, and has answered, any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no

[36] 1 Gr. Ev., § 447; 1 Whar. Ev., § 527.

[37] Tay. Ev., §§ 1404, 1431; Moody v. Rowell, 17 Pick., 498; 28 Am. D., 317; Clarke v. Saffery, Ry. & M., 126.

evidence can be afterwards given to contradict his answer.[38] This rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.[39] As neither of these reasons apply to questions relating to relevant facts, the best test of whether the denial of a fact on cross-examination may be contradicted is this: "Would the cross-examining party be entitled to prove such fact as part of his case if it had not been alluded to in the cross-examination?"[40] Hence, when a witness denies, on cross-examination, any fact tending to show that he is not impartial, such fact may be proved by other testimony, notwithstanding his denial; for the other party would have had the right to give evidence of

[38] Ste. Dig., art. 130; Tay. Ev., § 1438; Carroll v. State, 32 Tex. Cr. R., 431; 24 S. W., 100; 40 Am. St. R., 786.

[39] Tay. Ev., § 1439.

[40] 1 Whar. Ev., § 559; per Sharswood, P., in Hilde-burn v. Curran, 65 Pa. St., 63; Combs v. Winchester, 39 N. H., 13; 75 Am. D., 203; 2 Ell. Ev., § 977.

that fact without having interrogated the witness in regard to it at all.[41]

§ 117. When proper foundation laid on cross-examination, previous inconsistent statements may be proved.—But a witness may always be asked on cross-examination whether he has not made any former statement as to some fact relative to the subject matter of the action, and inconsistent with his present testimony; and if the circumstances of such supposed statement are referred to with sufficient particularity to clearly designate the occasion, and he does not distinctly admit having made such a statement, proof may be afterwards given that he did in fact make it.[42] Such proof is admitted upon the ground that the fact of the witness having previously made conflicting statements would materially diminish the confidence which might otherwise be placed in his present testimony; but the general rule is,

[41] Tay. Ev., § 1442; Att'y-Gen. v. Hitchcock, 1 Ex. R., 94, 100, 102; Lodge v. State, 122 Ala., 99; 26 So., 210; 82 Am. St. R., 23, note.

[42] Ste. Dig., art. 131; Tay. Ev., § 1445; 1 Gr. Ev., § 449; 1 Whar. Ev., § 551; Conrad v. Griffey, 16 How., 38, 46; Whiteford v. Burckmyer, 1 Gill, 227; 39 Am. D., 640; 2 Elliott Ev., § 974.

that a proper foundation must be laid for it by first asking the witness whether he has not made such prior contradictory statements, in order to enable him to recall the incidents, and explain, if he can, the apparent inconsistencies.[43] Such a restriction would seem to be no more than simple justice to the witness whose credibility is thus attacked, but in several of the states of the Union it is either not imposed at all,[44] or else left discretionary with the court.[45]

§ 118. Previous inconsistent statements in writing may not be proved unless writing first shown to witness or its absence explained.— Where the previous inconsistent statement referred to in the preceding section has been made in writing, the witness may not be cross-examined in reference to it, until the paper has first been shown to him, and he has

[43] 1 Gr. Ev., § 462; 1 Whar. Ev., § 555; Mattox v. United States, 156 U. S., 237, 244; Skaggs v. Martinville, 140 Ind., 476; 39 N. E., 241; 49 Am. St. R., 209; 33 L. R. A.. 781.

[44] In Maine, New Hampshire, Vermont, Massachusetts and Connecticut. See cases cited, 1 Whar., Ev., § 556.

[45] Pennsylvania and Minnesota. See 1 Whar. Ev., § 556.

admitted that he wrote it. If he admits having written it, the paper must itself be put in evidence as the best proof of its contents, but if he denies having written it, he cannot be further interrogated in regard to it, nor has the opposing party a right to inspect it until it has been proved by other evidence to be in the handwriting of the witness; for until this is done, it is not admissible in evidence at all, and its contents can have no relevancy to the case.[46] If it be shown that the paper has been lost or destroyed, or that it is not in the power of the cross-examining party to obtain it, the regular course would be to first prove its contents by secondary evidence, and then ask the witness if he wrote such a paper; but it is always discretionary with the judge to depart from this order of proceeding whenever it seems likely to occasion inconvenience by disturbing the regular progress of the trial.[47]

§ 119. Re-examination restricted to explanation of statements on cross-examination—Leading questions.—After the cross-examination is concluded, the party who called the witness has a right to re-examine him for the

[46] 1 Gr. Ev., § 463; 2 Elliott Ev., § 976.

[47] 1 Gr. Ev., §§ 464, 465; Tay. Ev., § 1447.

purpose of obtaining an explanation of the matters referred to in cross-examination. He may ask him all questions proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motives which moved him to use such expressions; but he cannot go further and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[48] A witness may be re-examined upon every matter stated by him on his cross-examination, whether the facts so stated by him were properly admissible in evidence or not, unless such statement was expressly excluded from the evidence at the time it was made, as irresponsive to the question or otherwise irrelevant.[49] The rule restricting the putting of leading questions on examination in chief applies equally to putting them on re-examination.[50] Whenever, by permission of the court or consent of the other side, a party elicits from his witness on re-exam-

[48] 1 Stark. Ev., p. *231; 1 Gr. Ev., § 467; Tay. Ev., § 1474; 2 Elliott Ev., §§ 929-938.

[49] 1 Gr. Ev., § 468; Tay. Ev., § 1475; *ante*, § 99.

[50] Ste. Dig., art. 128.

ination matters which should properly have been given in evidence upon the examination of the witness in chief, his adversary has a right to cross-examine the witness upon such new matters; and the party who called the witness may re-examine him again, but only upon the subject of such second cross-examination.[51]

§ 120. Impeaching credit of witness, in what cases allowable.—After the examination of a witness has been concluded, his credit may be impeached in four ways: 1. By disproving by the testimony of other witnesses, any facts stated by him which are material to the issues on trial.[52] 2. By proof of his having made statements out of court inconsistent with his testimony, in cases where the necessary foundation has been first laid by interrogating the witness about such contradictory statements, as already explained.[53] 3. By proof of any facts showing a bias or prejudice on the part of the witness in favor of the party by whom he was called or against the opposite party, as relationship, sympathy, or interest in the matter of controversy or in the

[51] Ste. Dig., art. 126.
[52] *Ante*, § 116.
[53] *Ante*, § 117.

event of the suit;[54] or proof of the witness having been convicted of any infamous crime, in cases where such conviction would not render him incompetent to testify.[55] 4. By general evidence affecting his character for veracity.[56] A party may not thus impeach the credit of his own witness further than by contradicting his testimony as to any particular facts by the testimony of other competent witnesses. The reason for this rule is, that a party who, by calling a witness, represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it, should not be permitted to impugn that witness' general reputation for truth, or to impugn his credibility by general evidence tending to show him unworthy of belief; for this would "enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him."[57] As this

[54] 1 Whar, Ev., § 566; State v. Burpee, 63 Vt., 1; 25 A., 964; 36 Am. St. R., 772; 19 L. R. A., 145.

[55] 1 Whar. Ev., § 567; Com. v. Knapp, 9 Pick., 496; 20 Am. D., 491.

[56] 1 Gr. Ev., § 461; 1 Whar. Ev., § 562.

[57] Bull. N. P., 297; 1 Gr. Ev., § 442; 1 Whar. Ev., § 547; 2 Elliott Ev., § 985.

reasoning is not applicable where the witness is not one of the party's own selection, as the subscribing witness to a will or deed, a party is generally allowed to impeach the veracity of any witness whom the law obliges him to call;[58] and as it often happens that a witness who intends to speak the truth may, either from misapprehension or imperfect knowledge or recollection, state a particular fact incorrectly, there is no reason why, when one of a party's witnesses has misstated a fact, such party should be precluded from showing what actually did take place by any other competent testimony.[59] A party who has been taken by surprise by the testimony of his own witness is generally permitted to cross-examine him as to what he had stated in regard to the matter on former occasions, either in court or otherwise, for the purpose of refreshing the memory of the witness and giving him full opportunity to set the matter right, as well as for the purpose of explaining the attitude of the party calling the witness. But such questions cannot be put for the mere purpose of discrediting the witness, nor can

[58] 1 Gr. Ev., § 443.

[59] 1 Gr. Ev., § 443; 1 Stark. Ev., p. *244; 1 Whar. Ev., § 549.

his contradictory statements upon other occasions be proved ordinarily by other witnesses.[60]

§ 121. Proof of particular facts tending to show bias, or previous conviction of an infamous crime.—Of the four methods above enumerated by which the credit of a witness may be impeached by the adverse party, the first and second need no further explanation in addition to what has been already stated concerning them.[61] The third method, which is by proof of particular facts tending to show that the witness is subject to some bias, or has been convicted of an infamous crime, derives its origin mainly from the effect of the statutes removing the former disqualification of witnesses upon the ground of interest or of infamy. To that extent it is an

[60] 1 Gr. Ev., § 444a; 1 Whar. Ev., § 549; Cox v. Eayres, 55 Vt., 24; 45 Am. Rep., 583; Hickory v. United States, 151 U. S., 303, 9. While the weight of authority is against receiving testimony of such contradictory statements, it has been held in several late cases that the court has discretionary power to admit it. See Selover v. Bryant, 54 Minn., 534; 56 N. W., 58; 40 Am. St. R., 349; 21 L. R. A., 418; Smith v. Briscoe, 65 Md., 561; 5 A., 334.

[61] *Ante*, §§ 116, 117.

innovation upon the common law, which requires all objections going to the competency of a witness to be made before he is sworn, or if subsequently discovered, as soon as they come to the knowledge of the objecting party, and to be sustained by proof to the court, and, unless this is done, considers them waived.[62] In actual practice it is usual to first interrogate a witness upon cross-examination as to the existence of any facts showing that he is subject to some bias, or has an interest in the event of the suit, and only to introduce other evidence of such facts in case he denies or does not admit them; yet, although this course is to be commended both on account of its fairness and as calculated to save time, there seems to be no reason why a party who omits to lay such a foundation should therefore be precluded from afterwards introducing independent evidence upon these points.[63] In the absence of any stat-

[62] 1 Stark. Ev., pp. *115, *144; 1 Gr. Ev., §§ 421-425; 2 Elliott Ev., § 973, § 981.

[63] See ante, § 116. The only reported case which I have found that excluded this kind of evidence because the witness had not been previously interrogated on the subject is Edwards v. Sullivan, 8 Ired. L., 302. But see contra, Martin v. Barnes, 7 Wis., 239, which

utory provision upon the subject, the proof that a witness has been convicted of any infamous crime (unless he has admitted it on cross examination) must always be by production of a copy of the record of the judgment of his conviction.[64]

§ 122. Proof of general reputation for want of veracity.—The fourth method of impeaching the credit of a witness is by the testimony of other witnesses to the effect that they know his general reputation for truth and veracity in the community in which he has lived, and that such general reputation is bad. Such evidence must be confined to his general reputation, and no testimony as to particular facts is permitted; for every man is supposed to be capable of supporting the one, but it is not likely that he would be prepared to answer the other without notice.[65] After

seems the better law. Also Wyeth v. Walzl, 43 Md., 426; Chilton v. State, 45 Md., 564, and Lodge v. State, 122 Ala., 97; 26 So., 210; 82 Am. St. R., 23, and extended note. But witness cannot be impeached by proof of his having been indicted. People v. Morrison, 195 N. Y., 116; 88 N. E., 21; 133 Am. St. R., 780.

[64] See *ante*, § 115, note.

[65] 1 Gr. Ev., § 461; 1 Whar. Ev., §§ 562-5; conf. Tay. Ev., §§ 1470-1; Ste. Dig., art. 123; and see Teese

the impeaching witnesses have testified that they know the general character for truth and veracity of the witness sought to be impeached, and that it is bad, they may be further asked whether they would believe him on oath;[66] but it is not held essential, in order to throw discredit upon his testimony, that they should state that they would not believe him on his oath.[67] Although the testimony in chief of the impeaching witnesses must be strictly confined to general reputation, they may be asked on cross-examination to name the persons whom they have heard speak against the character of the witness impeached.[68] When the character of a witness has been thus impeached, the party who called him may give evidence in reply to

v. Huntingdon, 23 How., 2, 11; also note, 71 Am. D., pp. 771-775; Griffin v. State, 26 Tex. Ap., 157; 9 S. W., 459: 8 Am. St. R., 46; 2 Elliott Ev., § 978.

[66] 1 Whar. Ev., § 565; see 1 Gr. Ev., § 461; Tay. Ev., § 1470; Spies v. People, 122 Ill., 1; 12 N. E., 865; 17 N. E., 898; 3 Am. St. R., 320, 426; Holbert v. State, 9 Tex. Cr. Ap., 219; 35 Am. R., 738.

[67] 1 Whar. Ev., § 565; 1 Gr. Ev., § 461; People v. Tyler, 35 Cal., 353.

[68] 1 Whar. Ev., § 565; 1 Gr. Ev., §§ 461-2; Montgomery v. Crossthwaite, 90 Ala., 553; 26 N. E., 575; 24 Am. St. R., 832, 843; 12 L. R. A., 609.

show that he is worthy of credit, by either contradicting the testimony or attacking the credibility of the impeaching witnesses.[69] In the courts of the United States and of most of the states when a witness is impeached in this manner, the inquiry is restricted to his general reputation for truth and veracity, but the English rule which extends it to his general moral character is followed in the states of Alabama, Kentucky, Missouri, New York, North Carolina, South Carolina and Tennessee.[70]

[69] 1 Whar. Ev., § 568; 2 Elliott Ev., § 972.

[70] Teese v. Huntingdon, 20 How., 2; Blue v. Kibby, 1 T. B. Mon., 195; 15 Am. Dec., 95, and note; 1 Whar. Ev., §§ 562, 563.

CHAPTER V.

PRODUCTION OF DOCUMENTS.

§ 123. How party to suit may compel his adversary to produce documents.—The common law provides no means of compelling any party to a suit to produce any document in his possession or power, in order that it may be used in evidence by his adversary,[1] excepting that the courts may, under certain circumstances, as hereafter explained, make an *order for the inspection of writings* in the possession of one party to a suit in favor of another;[2] and that whenever, as we have already seen,[3] due notice has been given to any party to produce at the trial any document in his possession or power, his failure to do so gives the adverse party a right to prove the contents of such document. This omission to provide means for compelling a party to the suit

[1] 1 Gr. Ev., § 560.

[2] 1 Gr. Ev., § 559; 1 Whar. Ev., §§ 742-755. See § 124 *post.*

[3] § 71 (6), *ante.*

to produce any documentary evidence in his possession or power, was but carrying out the old common law rule that parties to the record could not be compelled, in trials by jury, to give evidence for the opposite party against themselves, either in civil or criminal cases.[4] Although by statutory enactments, both in this country and in England, this rule has been so far abrogated as to make a party compellable to testify at the summons of his adversary in civil cases, yet as very few, if any at all, of these statutes contain express provisions for compelling parties to produce any documents in their possession or power, it has been denied by some courts that the common law rule in this particular has been at all affected by them;[5] but it may be considered as now well established by the weight of authority that under these statutes an adversary may be compelled by a *subpœna duces tecum* to produce books and papers in his possession the same as any other witness.[6]

[4] 1 Gr. Ev., § 330.

[5] See Trotter v. Latson, 7 How. Pr., 261; Duke v. Brown, 18 Ind., 111; Cross & Co. v. Johnson, 30 Ark., 396.

[6] Bonesteel v. Lynde, 8 How. Pr., 226; People v. Dyckman, 24 id., 222; Mitchell's Case, 12 Abb. Pr.,

§ 124. When an inspection of documents in the hands of opposite party will be allowed at common law.—The cases in which common law courts will order an inspection of documents in the possession or power of one party to be allowed to his adversary independently of any statutory provisions upon the subject, are: (1) When the document of which inspection is desired has been set forth and relied upon by either party in his pleadings.[7] (2) When the plaintiff is desirous of bringing an action upon an instrument executed by himself or in which he is otherwise interested, and which, being in the hands of his opponent, he cannot safely declare upon without first in-

249; conf. Texas v. Chiles, 21 Wall., 488; U. S. v. Tilden, 10 Ben., 566; Merchants' Nat. Bk. v. State Nat. Bk., 3 Cliff., 201. See note in Fed. Rep., vol. 15, p. 722, by Jno. D. Lawson, to case of Wertheimer v. Continental R'y & Trust Co., p. 716, Circt. Ct. S. Dist. N. Y., Feb'y 17, 1883; Bischoff's Heirs v. Brown, 29 Fed. Rep., 341, 343; 2 Elliott Ev., § 700.

[7] Tay. Ev., § 1588 (6th ed.). Mem.—This and the following sections, cited as of the sixth edition of Taylor, are omitted in the later editions in consequence of statutory changes in the English law. See, also, Woodman v. Devereux, 2 M. & Gr., 758; Blogg v. Kent, 6 Bing., 614.

specting it.[8] (3) Where an instrument to which the applicant is either a party or a privy, or in which he has a legal interest, has been deposited in the hands of another party to the suit, either as trustee for the applicant only, or at least for the applicant jointly with himself.[9] (4) Where it appears that a party has some legitimate control over a document, which, if in his possession, he would be required to allow his adversary to inspect, the order for inspection will be passed, although such document be actually held by a third person, if he hold it as the agent of such party, or subject to his authority.[10] In all such cases the method of obtaining an inspection is for the party seeking it to make an application to the court or to a judge at chambers, supported by an affidavit setting forth the facts, and stating that he possesses no copy of such document, and that no counterpart thereof was ever executed.[11]

§ 125. Statutory enactments upon this subject.—These common law powers of the courts

[8] Tay. Ev., § 1589 (6th ed.); 1 Whar. Ev., § 742; 1 Gr. Ev., § 559; Rowe v. Howden, 4 Bing., 539, note.

[9] Tay. Ev., § 1590 (6th ed.); 1 Whar. Ev., § 743; Blogg v. Kent, 6 Bing., 615.

[10] Tay. Ev., § 1591 (6th ed.); 1 Whar. Ev., § 742.

[11] Tay. Ev., § 1592 (6th ed.); 1 Whar. Ev., § 743.

have, however, in modern times, been greatly enlarged by statute. The courts of the United States are empowered by act of congress,[12] upon motion being made, after due notice thereof, by either of the parties to any action or legal proceeding pending before them, to require the opposite party to produce books or writings in his possession or power, which contain evidence pertinent to the issues, in cases and under circumstances where such party may be compelled to produce the same under the ordinary rules of proceedings in chancery, and if said party fails to comply with such requirement, to enter up judgment of non-suit or by default against him. Similar provisions have been enacted in most of the states of the Union.

§ 126. **When production or inspection of documents may be compelled in equity.**—The cases and circumstances under which the production or inspection of documents may be compelled in equity, are briefly as follows: The complainant or party desiring such production or inspection must first allege in his bill (in effect) that his adversary has in his possession or power documents relating to the matters mentioned in the bill, and that by

[12] Rev. Stats. U. S., § 724.

the contents of said documents, if the same were produced, the truth of such complainant's case would appear. The defendant is then required to admit or deny the truth of these allegations; if he denies having possession or power over the documents described, that ends the matter; but if he admits having possession or power over them, he is bound to describe them in his answer, and will be required to produce them for the inspection of the complainant,[13] if it appears to the court, from the answer of the defendant, that the documents so admitted by him to be in his possession or power[14] are relevant to the case of the complainant, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent by showing some specific defect therein,[15] *unless* it also appears that such documents might subject the defendant to a criminal prosecution or forfeiture, or would violate the rules which

[13] Wigram on Discovery, § 285; 1 Pomeroy's Equity Jurisp., § 229; Lancy v. Randlett, 80 Me., 169; 13 A., 686; 6 Am. St. R., 169.

[14] Wigram on Discovery, § 294.

[15] Wigr. Disc., § 295; Tay. Ev., §§ 1604-5 (6th ed.); 1 Whar. Ev., § 754; 2 Elliott Ev., § 1385.

relate to professional privilege.[16] Such production of documents will be compelled in aid of *civil rights* only, and never to aid either in the prosecution of or the defense to an indictment or information.[17] Nor has a party any right whatever to the discovery of the evidence, or an inspection of writings, which either relate exclusively to his adversary's case, or are not material to the issues about to be tried at law,[18] *except* that whenever the defendant, having admitted such documents to be in his possession, so incorporates them by general or special reference with his answer as to make them form a substantial part of it, the complainant will in such case be entitled to their production, whether they constitute his title or the exclusive title of the defendant; because the latter, by thus dealing with the documents, will be held to have waived all objection to their production.[19] In all cases the *onus* is

[16] Tay. Ev., § 1603 (6th ed.); 1 Whar. Ev., § 754; Wigr. Disc., §§ 127-147, 442.

[17] Wigr. Disc., § 10; Tay. Ev., § 1603 (6th ed.).

[18] Tay. Ev., § 1603 (6th ed.); Wigr. Disc., §§ 224-237; Howell v. Ashmore, 1 Stock., 82; 57 Am. D., 371, 375; Boyd v. United States, 116 U. S., 616.

[19] Tay. Ev., § 1606 (6th ed.); 1 Whar. Ev., § 755.

upon the party seeking the discovery of the contents of documents to prove his right thereto, and the only evidence upon which he can rely is the admissions of his adversary.[20]

§ 127. Production of documents in hands of one not a party may be compelled by subpoena duces tecum.—But whenever any documents which can furnish evidence material to the issues on trial are in the hands of a person other than a party to the suit, such person may be compelled to produce all such documents in his possession, unless he have a lawful or reasonable excuse to the contrary; upon the same principle that every man, in furtherance of justice, is bound to disclose all the facts within his knowledge which do not tend to his own crimination.[21] The method by which such production is compelled is by a *subpœna duces tecum,* which is issued upon application of the party who desires to offer the documents in evidence, and must specify them with reasonable distinctness.[22]

[20] Tay. Ev., § 1605 (6th ed.); 1 Whar. Ev., § 755.

[21] Starkie Ev., p. *110; 2 Elliott Ev., § 700.

[22] Tay. Ev., § 1240; 1 Whar. Ev., § 277. The power to issue it is always discretionary with the court which must first be shown that *primâ facie* the document called for would be competent evidence in the case. Daniel v. Goodyear Mfg. Co., 128 Fed. R., 753.

When a witness has been served with a *subpœna duces tecum* he is bound to attend with the documents demanded, if he has them in his possession, and he must leave the question of their actual production to the court, which will decide upon the validity of any excuse that may be offered for withholding them.[23] The witness will not be compelled to produce any document which might tend to criminate him or expose him to any penalty or forfeiture,[24] or which does not appear to be in some manner relevant to the issues on trial. Nor will an attorney be required to produce any document which he holds confidentially for his client, and which his client has the right to keep back; but he may be required to testify as to the existence of such documents, and whether they are in his possession, so as to enable the other party to give secondary proof of their contents.[25] This is upon the theory that documents so held by an attorney for his client are in contempla-

[23] 1 Starkie Ev., p. *110; Tay. Ev., § 1240; 1 Whar. Ev., § 377; 2 Elliott Ev., § 1443.

[24] Ste. Dig., art. 118; Tay. Ev., § 1464.

[25] Tay. Ev., §§ 457, 458; Ste. Dig., art. 119; 1 Gr. Ev., § 246; 1 Whar. Ev., § 585; 2 Elliott Ev., § 1413.

tion of law in the possession of the client himself.

§ 128. **How documentary evidence is introduced.**—Excepting those documents which, being authenticated by some official seal or signature of which the court takes judicial notice, may be said to prove themselves, no document is received as evidence until the party desiring to offer it has first established its genuineness, to the satisfaction of the judge, by the oral testimony of one or more witnesses to the handwriting, or to the place or custody from which it was obtained. Before the document can be read, the judge must decide, as a preliminary question, whether such introductory testimony is sufficient, assuming it to be true, to render the document *primâ facie* competent as evidence. Its credibility must be left for the jury to pass upon in making up their final verdict.[26] And therefore, although the party against whom it is proposed to offer the document is not permitted at this stage of the trial to call other witnesses to contradict this preliminary testimony, he may cross-examine the witnesses by whom it was given, in order to show its insufficiency, and thus exclude it as incom-

[26] 1 Gr. Ev., § 49; 1 Elliott Ev., § 28.

petent.[27] After thus producing competent testimony as to the genuineness of the document, the party by whom it is offered must next submit it to the inspection of the opposing counsel, in order that he may then state his objections, if any, to its admissibility. Although it is by no means unusual in practice to permit the opposing counsel to examine documents before the preliminary proof of their genuineness has been given, yet they are not entitled to do so, as a matter of right, until afterwards; for until its genuineness has been thus established *primâ facie,* no document can be considered as properly before the court for any purpose.[28] If, upon inspection of the document, any objection to its admissibility is apparent, it must be stated before the paper is read, as otherwise it will be considered to have been waived. After a document has once been read in evidence, no new objections can be raised to its admissibility, excepting such as the party objecting had no opportunity to make sooner, or unless the document was expressly admitted subject to exception. In general, all ques-

[27] Jones v. Fort, M. & M., 196; Rosc. N. P., 271; II Phil. Ev., 4th Am. ed., C., H. & E.'s note, p. 503.

[28] Tay. Ev., § 1413; Rosc. N. P., 185.

tions as to the admissibility of documents are decided by the judge before they are allowed to be read, unless the objection be founded upon some extrinsic fact alleged by the party objecting. If such extrinsic fact would constitute a valid cause for excluding the document, and the party objecting can establish it by cross-examination of the witness who proved the document, or by other proof not open to contradiction by his opponent, he may do so at once, and so exclude the paper altogether; but if the fact so alleged be one which is disputed by the party offering the document, then the paper must be read in evidence to the jury, who should be instructed to exclude it from their consideration, if they find the existence of the facts which would render it inadmissible.[29] Thus in an action for libel, where the plaintiff offered in evidence the alleged libelous paper, after proving by a third party that he had received it from the defendant, and the latter objected upon the ground of its being a privileged communication, he was permitted to cross-examine the witness in order to show its privileged character, and, having estab-

[29] Richardson v. Robbins, 124 Mass., 105; Coxe v. England, 65 Pa. St., 212.

lished this to the satisfaction of the court, the paper was not allowed to be read.[30] And so, also, in a case where the alleged libel was an indorsement made by the defendant, a naval officer, upon a resignation sent by the plaintiff, through him, to the Navy Department, the defendant was allowed not only to cross-examine the witness who proved the indorsement, but also to put in evidence, before the paper was read, a copy of the Regulations of the Navy, for the purpose of showing that it was his duty to make such indorsement upon the resignation under the circumstances detailed by the witness.[31] But if in either of these cases the existence of the alleged facts, which made the communications privileged, could not have been established by the witnesses who produced them, and had been open to dispute, and had been denied by the parties offering the writings in evidence, the papers must have been admitted to go to the jury, subject to be excluded by them from consideration if they should find the alleged facts to be true.[32]

§ 129. Effect of alterations or spoliation.— No document which after its completion has

[30] Trussell v. Scarlett, 18 Fed. Rep., 214.

[31] Maurice v. Worden, 54 Md., 251.

[32] Odgers on Libel and Slander, p. *185.

been altered in any material point is admissible in evidence for the purpose of enforcing any right dependent upon it in favor of any person by whom or by whose concurrence such alteration was made, or in favor of the representative in interest of any such person, unless the alteration was made with the consent of the party sought to be charged, or of his representative in interest.[33] This rule is founded upon the very obvious principle of natural justice that no one who has designedly falsified a document should afterwards be allowed to avail himself of such falsified document as evidence in his own behalf.[34] And therefore one who for this reason is precluded from offering in evidence an original paper is not allowed to establish its contents by secondary proof.[35] Upon the same ground

[33] 1 Whar. Ev., § 622; Ste. Dig., art. 89; 1 Gr. Ev., §§ 564-568; Tay. Ev., §§ 1819-1838; 1 Thomp. Trials, §§ 1392-1404; Woodworth v. Bank of America, 19 Johns., 391; 10 Am. D., 239, note p. 267; Smith v. United States, 2 Wall., 219; Fulmer v. Seitz, 68 Pa. St., 237; 8 Am. R., 172; Draper v. Wood, 112 Mass., 315; 17 Am. R., 96; 2 Elliott Ev., § 1491.

[34] 1 Whar. Ev., § 622; 1 Gr. Ev., § 565; Tay. Ev., § 1821; Masters v. Miller, 4 T. R., 329; S. C., 1 Sm. Lea. Cas., *934; Wood v. Steele, 6 Wall., 80.

[35] Id.; Martindale v Follett, 1 N. H., 95; Newell

any person by whom or by whose connivance a document has been fraudulently destroyed or mutilated is not permitted to prove its contents by secondary evidence.[36] But a person who cannot be shown to have been in any way responsible by negligence or otherwise, and who does not claim as the representative of one who is so responsible for such alteration, destruction or mutilation of a document may support his case by any legal proof as to what such document was before its alteration or destruction, for otherwise the person who had altered or destroyed a document might derive a great advantage from his own wrongful act.[37] In the absence of positive proof as to when and by whom any alterations appar-

v. Mayberry, 3 Leigh, 250; Wood v. Steele, 6 Wall., 80.

[36] Blade v. Noland, 12 Wend., 173; 27 Am. D., 126; Price v. Tallman, 1 Coxe, N. J. (L.), 447. But see Steele v. Lord, 70 N. Y., 280; 26 Am. R., 602; Stone v. Sanborn, 104 Mass., 319; 6 Am. R., 238.

[37] 1 Gr. Ev., § 566; 1 Whar. Ev., § 627; Cutts v. United States, 1 Gall., 69; 6 Fed. Cas., p. 1086; United States v. Spalding, 2 Mass., 278, 482; 27 Fed. Cas., p. 1278; United States v. Linn, 1 How., 104, 110; Rees v. Overbaugh, 6 Cowen, 746; Piersol v. Grimes, 30 Ind., 129; 93 Am. D., 673; Hunt v. Gray, 35 N. J., 227; 10 Am. R., 232; Drum v. Drum, 133

ent upon the face of a document were made, the general presumption of law, as already stated,[38] is that they were made contemporaneously with its execution, for the law will not presume fraud without some evidence to sustain the imputation; but any ground of suspicion appearing upon the face of the instrument or arising from the circumstances of the case is sufficient to rebut this general presumption, and throws upon the party offering the document the burden of showing how, when, by whom and with what intent such alterations were made, it being judged only reasonable that one who desires to avail himself of the benefit of a document bearing suspicious alterations on its face should be prepared to show how they came there.[39] When a document bearing alterations apparent upon its face is offered in evidence it is for the court to determine in the first place whether in view of the evidence already given in the cause the paper shows sufficient grounds for suspicion upon its face to rebut the general

Mass., 566; conf. Davidson v. Cooper, 13 M. & W., 352; 2 Elliott Ev., § 1491.

[38] *Ante,* Sec. 79, p. 174.

[39] 1 Gr. Ev., 564; Tay. Ev., § 1819; *ante,* p. 175, note 23.

presumption against fraud, and to require a satisfactory explanation of the alterations before it can be received in evidence at all; but after such explanations have been given it is for the jury to decide as a question of fact what weight they are entitled to.[40] The rule requiring the person who offers such a document in evidence to clear himself from all responsibility for any material alterations appearing upon its face is in England limited to cases where *the altered instrument is relied on as the foundation of a right sought to be enforced*,[41] and has been held not to apply to cases where such instrument was introduced merely to prove a right or title which, although originally created by the execution of the altered paper, was no longer dependent upon its continuing efficacy, or to prove some collateral fact.[42] An alteration is re-

[40] 1 Gr. Ev., 561, note 1; Abb. Tr. Ev., ch. xxi, 31, and note 9; Id., ch. xlviii, 7 note 6; 1 Whar. Ev., § 629; Tillou v. Clinton Ins. Co., 7 Barb., 564; Little v. Herndon, 10 Wall., 26, 31; Parramore v. Lindsay, 63 Mo., 63; Belfast Nat. Bank v. Harrison, 68 Me., 522; 2 Elliott Ev., § 1505.

[41] Tay. Ev., §§ 1824-1827; Davidson v. Cooper, 11 M. & W., 779, 800.

[42] Id.; Hutchins v. Scott, 2 M. & W., 809; Agr. Cattle Ins. Co. v. Fitzgerald, 16 A. & E., N. S., 432;

garded as immaterial when it does not vary the legal effect of the document, as where words are inserted which the law would supply, or which are altogether inoperative, or are necessary to correct an obvious error, and in such cases does not affect the admissibility of the document in evidence.[43]

Ld. Ward v. Lumley, 5 H. & N., 87; 15 L. J. Ex., 322; Lewis v. Payne, 8 Cow., 71; 18 Am. D., 427; Priest v. Whitacre, 78 Va., 151.

[43] Tay. Ev., § 1823; 1 Gr. Ev., § 567; 1 Whar. Ev., 623; Aldous v. Cornwell, L. R., 3 Q. B., 573; Craighead v. McLoney, 99 Pa. St., 211, 214. See Suffell v. Bank of England, L. R., 9 Q. B. Div., 555; Duker v. Franz, 7 Bush, 273; 3 Am. R., 314; Vose v. Dolan, 108 Mass., 145; 11 Am. R., 331. As to filling up blanks, see Angle v. N. W. Mut. Life Ins. Co., 92 U. S., 330; 2 Elliott Ev., § 1496.

CHAPTER VI.

PRODUCTION OF PERSONS AND THINGS.

§ 130. Production of persons or things for inspection by court or jury.—Independently of any statutory provision the courts have a discretionary power to compel the production before them for inspection of any person or thing described or referred to in the oral testimony of the witness, whenever they may deem such inspection to be material and proper in order to illustrate or confirm or contradict the oral testimony of the witnesses as to the identity, appearance, condition or nature of such person or thing,[1] and the exercise of this discretion will not be reviewed on appeal except in cases of manifest

[1] Best on Evidence, § 197; 1 Thomp. on Trials, ch XVII, § 850 et seq.; 1 Whar. Ev., § 346; Mulhado v. Brooklyn, etc., R. R., 30 N. Y., 370; Schroeder v. Chicago, etc., Ry. Co., 47 Iowa, 375; Springer v. Chicago, 135 Ill., 523, 561; 26 N. E., 514; 2 L. R. A., 609; 2 Elliott Ev., § 1231, etc.

abuse.[2] They have a like power to permit any experiments to be made before the jury which will elucidate the questions at issue.[3]

§ 131. Power to compel parties to submit to personal examination.—Whether, in a civil action for physical injuries sustained by the plaintiff, he may be compelled to submit to an examination of his person, either by experts before the trial or by the court or jury at the trial, for the purpose of ascertaining the nature and extent of his injuries, is a question upon which the decisions are conflicting. While it is permitted in some of the states,[4] it is held in others and in the courts of the United States that a party cannot be

[2] Shepard v. Mo. Pac. Ry. Co., 85 Mo., 629; 55 Am. R., 390; Hatfield v. St. Paul, etc., R. R. Co., 33 Minn., 130; 22 N. W., 176; 53 Am. R., 14; Sidekum v. Wabash, etc., Ry. Co., 93 Mo., 400; 4 S. W., 701; 3 Am. St. R., 549; Ala. Gt. So. R. R. Co. v. Hill, 90 Ala. 71; 8 So., 90; 24 Am. St. R., 764; 9 L. R. A., 442.

[3] United States v. Ball, 163 U. S., 662, 673. See extended note in Vol. 53, Am. St. R., 375. Also notes in Vol. 15, L. R. A., 221, and Vol. 42, L. R. A., 384.

[4] Atchison, etc., Ry. Co. v. Thal, 29 Kan., 466; 44 Am. R., 659; White v. Milwaukee City Ry. Co., 61 Wis., 536; 21 N. W., 524; 50 Am. R., 165; Ala. Gt. So. R. R. Co. v. Hill, *supra*.

subjected to such an examination without his consent.[5] There is also conflict in the decisions of the courts in different states as to how far the accused in a criminal trial may be compelled to submit to a physical examination without his consent.[6] It may be safely stated however as the general rule that the accused when on trial may be compelled to stand up in court for the purpose of identification and to expose such parts of his person as are not usually covered, but only such parts.[7]

§ 132. Power to seize and impound things to be used as evidence.—Independently of ex-

[5] Roberts v. Ogdensburg, etc., R. R. Co., 29 Hun, 154; Parker v. Enslow, 102 Ill., 273; Union Pacific Ry. Co. v. Botsford, 141 U. S., 250. But see Holt v. United States, 218 U. S. 245, 252. Otherwise when there is a state statute permitting such examination. Camden & So. Ry. Co. v. Stetson, 177 U. S., 172, 178; United Railways v. Cloman, 107 Md., 681, 690; 69 A., 370.

[6] 1 Whar. Crim. Ev., § 315; State v. Ah Chuey, 14 Nev., 79, 83; 33 Am. R., 530; State v. Garrett, 71 N. C., 85; 17 Am. R., 3; Stokes v. State, 5 Baxt., 619; 30 Am. R., 72; Day v. State, 63 Ga., 667.

[7] State v. Height, 117 Iowa, 650; 91 N. W., 935; 94 Am. St. R., 323 and note; Holt v. United States, 218 U. S. 245, 252.

press statutory authority, it has been held to be the duty of the officers who arrest a person on a criminal charge to search him and seize and remove from him any dangerous weapons found upon his person, and also to take from him any articles which may be of use in the trial of the offense of which he is accused, and retain them in their custody for that purpose.[8] But whether this common-law power extends so far as to authorize the court to take into its possession and retain for future use as evidence any things other than those found upon the person, or in the immediate actual possession of one arrested on a criminal charge, or such as may be voluntarily deposited in court as exhibits by a party, is at least doubtful. The question was fully discussed in a late case before the supreme court of Michigan,[9] which held that where a steam-boiler had exploded and the

[8] Whar. Cr. Pl. & Pr., § 60; Bish. New Cr. Proc., §§ 210, 211; Ex parte Hurn, 92 Ala., 102; 9 So., 515; 13 L. R. A., 120; Closson v. Morrison, 47 N. H., 483; 93 Am. D., 459; Spalding v. Preston, 21 Vt., 9; 50 Am. D., 68.

[9] Newberry v. Carpenter, 107 Mich., 567; 65 N. W., 530; 61 Am. St. R., 346 and note; 31 L. R. A., 163. Conf. Adams v. New York, 192 U. S., 585.

engineer was charged with manslaughter, the circuit judge had exceeded his powers in ordering the boiler and engine into the custody of the police, to be used as evidence at the trial. McGrath, C. J., however, delivered an elaborate and able dissenting opinion.

PART IV.

ON THE CONDUCT OF THE EXAMINATION OF WITNESSES.

CHAPTER I.

EXAMINATION IN CHIEF.

§ 133. The examination of witnesses, an art.—The examination of witnesses is an art, and as with all the other arts, in order to attain the highest degree of success in it, three things are requisite, viz.: correct theoretical knowledge, some practical experience in the application of that knowledge, and a peculiar talent for it. Without the last no man can ever become *great* in this branch of advocacy; but any person possessing the average amount of tact and common sense, may, with the aid of the other two requisites, acquire a respectable degree of proficiency. It is here proposed to state briefly the general theory upon which it should be conducted, as laid down by the best authorities upon the subject,[1] and confirmed by some personal observation and experience.

[1] See Quintilian, Inst., lib. V, cap. De Testibus;

§ 134. Object of examination in chief, and how accomplished.—The duty of counsel in examining a witness is to elicit the truth, and nothing but the truth, yet only so much of it as in his judgment may be calculated to benefit the cause of his client; and therefore, in order to avoid making the witness say anything else, the first and most important rule to be observed is: *Never to ask a question without a definite object, and, when the witness has given the testimony for which he has been called, to discontinue the examination at once.* For any further prosecution of the examination cannot possibly do the case much good, and may result in a serious disadvantage to it by bringing out something injurious. Hence it is always important to ascertain as far as posible, before the witness is put upon the stand, exactly what facts are expected to be proved by him, and if these facts are at all numerous, it is best for the examining counsel to have a brief memorandum of them before him during the exam-

Best on Ev., §§ 649, 663; Alison, Pr. Crim. Law, 546, 547; Evans on Cross-ex., in his appendix to Poth. Obl., No. 16, vol. 2, pp. 233, 234; The Advocate, by Cox; Hints on Advocacy, by Harris; Sergt. Ballantine's Experiences.

ination, as few things are more mortifying to him, than, after turning a witness over to his adversary, to suddenly remember that he has omitted to interrogate him upon some material fact which cannot be proved by any one else.

§ 135. The ordinary witness.—For the purposes of an examination in chief, witnesses may be divided into three general classes: 1. The ordinary witness, who intends to tell the truth, and whose bias, in so far as he has any, is in favor of the party by whom he is called. 2. The swift witness. 3. The hostile witness. The general rule for dealing with the ordinary witness is: *To put him at his ease, to direct his mind to the matters about which his testimony is required, and to let him tell his story in his own way, with no further interference than is necessary.* The best way to do this is to adopt a pleasant, respectful and friendly manner, and to begin by asking a few unimportant questions, very deliberately, and in an ordinary conversational tone, in order to give him time to collect his ideas and get over the natural embarrassment which most persons feel when first put upon the stand, before bringing him to speak of the matters about which his testimony is required. Having once put the wit-

ness at his ease and started him upon the right track, it is not well to interrupt him unnecessarily, for all interruptions have a tendency to confuse or irritate; and in order to reduce this tendency to a minimum, whenever interruptions are necessary, as for the purpose of excluding irrelevant matter, they should always be made in a pleasant and rather *apologetic* manner. It is best to make a witness relate the facts about which he testifies in the order of time in which they occurred, and it is generally advisable to call his attention as he goes along to any material facts which he omits, in so far as it can be done without putting directly leading questions. As soon as he has given the testimony for which he was called, he should at once be turned over to the other side for cross-examination. The practice of cross-examining one's own witness and making him repeat his testimony, is worse than useless. For successfully conducting an examination in chief, great patience and good temper are all important, and especially is this the case where the witness is stupid. Nothing can be more damaging than any display of irritability towards one's own witness.

§ 136. Questions should be simple, short and deliberately put.—It is of the utmost con-

sequence that all questions should be perfectly intelligible, and that in an examination in chief they should be put deliberately, so that the witness may have time to take them in fully and not be flurried in answering them. It is far better to ask half a dozen short, simple questions than a single long, complicated one covering the entire ground, and it is therefore important that all questions should be as brief as possible, and always clothed in such plain and familiar language as to be fully understood by the witness, especially if he be an uneducated person. Verbosity and pomposity are alike inexcusable in an examining counsel.

§ 137. **The swift witness.**—The swift witness, or one who wants to say too much, is a very dangerous character to deal with, and requires to be repressed instead of encouraged. This is best done by adopting a rather grave and ceremonious manner so as to check him at the outset, and then kindly, but peremptorily, requiring him to do no more than answer the questions put to him, which should be so framed as to give no room for expatiating. Such a witness should be got rid of as soon as possible, for there is always the greatest danger that he may seri-

ously injure the cause which he is over anxious to sustain.

§ 138. The hostile witness.—A hostile witness should never be called excepting when his testimony is absolutely necessary, and where this is the case, the great point is to make him state just so much as is required, and no more. It is well to make his hostility appear as soon as possible, for two reasons: first because as soon as the judge is satisfied that he is really an adverse witness, he will permit leading questions to be put on his examination in chief; and secondly, because the more hostile he appears to the party calling him, the more will his favorable evidence be esteemed, and the less weight will be given to whatever he says that is unfavorable. As a general rule, the less said to a witness of this kind the better. He should be brought directly to the point which he is called to prove by questions so framed as to afford the least possible room for evasion or explanation. All attempts at explanations should be stopped by telling him that he will have an opportunity for making them as soon as he has answered all the questions. When this time arrives, he will probably have forgotten at least half of them, and the others will prove far less effective than if made in

connection with the statement of the facts which they are intended to qualify. It is needless to add that a witness of this kind should be dismissed at the earliest possible moment. The importance of restricting the testimony of a hostile witness within the narrowest possible limits is even greater in the United States than in England, by reason of the rule generally prevailing in this country, by which the range of cross-examination is limited excepting (for the purpose of testing or attacking his credibility) to the facts and circumstances connected with the matters stated by the witness in his direct examination.

§ 139. **Duties of opposing counsel during examination in chief.**—The duties of opposing counsel during an examination in chief are to give the strictest attention to all the questions and answers, and to take notes of the testimony. Attention must be given to the questions as well in order to see that they are properly put as to ascertain their design; and to the answers, so as to consider their effect, and prevent any illegal testimony from being received without objection. The notes of testimony are of use principally as memoranda for the cross-examination and the argument before the jury, and also to assist in prepar-

ing the bills of exception in case of an appeal by either party. Improper questions must be objected to before they are answered; and as soon as a witness begins to state anything that is not legal evidence, he should be interrupted with an objection at once. For instance, when a witness, after stating that there was some agreement made between the parties to the suit, begins to tell what it was, he should be required to state whether such agreement was verbal or in writing before being allowed to proceed.

§ 140. Leading questions—Frivolous objections.—Leading questions should never be objected to, unless suggestive of an answer in some way material to the case. As to mere formal or introductory matters, about which there can be no room for dispute, they are not only unobjectionable, but rather to be encouraged as calculated to save time, and bring the witness to the point at once. As leading questions are oftener put through inadvertence than designedly, objection to them should not ordinarily be made to the court in the first instance, but rather by a good-natured caution to counsel. If, after such a hint, he should persistently continue to offend in the same way, a more peremptory tone, or a direct appeal to the judge, would

be warranted. Good judgment and great quickness of perception, as well as a thorough familiarity with the law of evidence, are required to know exactly when and how to object to evidence; for while on the one hand the making of too frequent and too frivolous objections is apt to have a very bad effect upon the jury, especially if they are overruled, yet, on the other hand, many a case has been won solely through the advantages gained by the practiced skill with which the successful counsel, having perfect command of the rules of evidence, could invoke and enforce them at the right moment against his less ready opponent.

CHAPTER II.

CROSS-EXAMINATION.

§ 141. Sergeant Ballantine's theory of cross-examination.—Cross-examination is a most powerful weapon in the hands of the skillful advocate, but likewise a dangerous one to be trifled with by a person who does not understand how to manage it, as it is a matter of every-day occurrence for a witness who has utterly failed to establish by his testimony in chief the facts that he has been called to prove, to be completely rehabilitated by an injudicious cross-examination. As Sergeant Ballantine very justly observes,[1] "If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. . . . In order to attain success in this branch of advocacy, it is necessary for counsel to form in his own mind an opinion upon

[1] Some Experiences of a Barrister's Life, H. Holt & Co., N. Y., 1882, pp. 104-6.

the facts of the case, and the character and probable motives of a witness before asking a question. This doubtless requires experience, and the success of his cross-examination must depend upon the accuracy of the judgment he forms." And again he says, "The object of cross-examination is not to produce startling effects, but to elicit facts which will support the theory intended to be put forward."

§ 142. Never ask a question without a definite object.—The cardinal rule already given for examination in chief, *Never to ask a question without a definite object,* is doubly important as applied to cross-examination; for here the witness, being presumably more or less adverse, is much more likely to say something damaging. The plan so often adopted by unskillful advocates, of recklessly asking a number of questions on the chance of getting at something, cannot be too much condemned; for it must always be remembered, that what is called a severe cross-examination, when applied to a truthful witness only makes the truth stand out more clearly; and, also, that if a dishonest witness, having inadvertently made an omission injurious to himself, is informed of its effect by the counsel persistently dwelling upon it, he will proba-

bly endeavor to shuffle out of it, and perhaps succeed in doing so. Hence the force of Lord Abinger's celebrated axiom for the conduct of a cross-examination, "Never drive out two tacks by trying to hammer in a nail."

§ 143. General character of cross-examination, how determined.—The manner of a cross-examination, like its matter, must be determined by the nature of the facts sought to be elicited, and the opinion formed of the character and disposition of the witness, and the motives by which he is probably actuated. In the great majority of cases, where the witness does not *intend* to misrepresent, a pleasant, frank and courteous manner is generally the best, for the reason that most people are much more easily led than driven, and a quarrelsome frame of mind is very apt to induce a spirit of contradiction. If, on the other hand, it appears that the witness deliberately intends to misrepresent, it is important to form an opinion as to how far he will probably be willing to go—whether he will flatly perjure himself, if necessary for the purpose, or whether he will not venture beyond equivocation; for while in the latter case he should be closely pressed upon the more salient points of his testimony, in order to deprive him of every opportunity of

evasion, such a course would be injudicious if he were evidently prepared to swear his case through at all hazards; for in that event he would probably have made himself thoroughly acquainted with all that he must say in order to sustain *them,* and therefore the more rigidly he is cross-examined upon these points, the more consistent and truthful will his story appear. In such cases it is better to direct the cross-examination to circumstances about which he would not naturally expect to be interrogated, and for which he would not therefore be likely to prepare himself in advance, and to put the questions in rapid succession. It is quite possible for a shrewd witness to concoct a story so plausible and consistent with itself, as to sustain triumphantly the severest cross-examination upon everything connected with it, which he has thought over and arranged in his own mind before hand. But if he is questioned in regard to minute cirumstances, having no apparent immediate bearing upon the main points at issue, it will be almost impossible for him to invent answers upon the spur of the moment that will not be likely to betray him. In forming an opinion as to the moral character of a witness's testimony, it will be well to bear in mind the statement of Ser-

geant Ballantine, who says that his experience has led him to the conclusion that honest witnesses endeavor to keep themselves to the facts they come to prove, but that lying ones endeavor to distract the attention by introducing something irrelevant. Often the best method to deal with an adverse witness is to decline cross-examining him at all, which, if done with a rather supercilious air, will frequently impress the jury with the idea that his testimony is either totally untrustworthy, or else has little or no bearing upon the case.

§ 144. Things to be avoided in cross-examination.—The principal things to be guarded against in a cross-examination are, first, permitting the witness to supply any omissions which he may have made in his testimony in chief; second, getting from him explanations of any apparent inconsistencies that he may have fallen into; third, allowing him to repeat and impress upon the jury the points of his testimony which tell most strongly in favor of the party who called him; and finally, giving the opposing counsel the opportunity of bringing out on re-examination some unfavorable testimony which would not have been admissible but for an injudicious question put during the cross-examination. Hence it is

always advisable to keep in mind the following rules, and never to depart from them without being able to give a satisfactory reason for so doing:

Upon perceiving that a witness has omitted some important point in his testimony, do not allude to it, but keep him as far from it as possible, that he may not have the opportunity to repair his blunder.

Never ask for explanations unless perfectly *sure* that they cannot be given, and even then be very cautious about doing so. It is always much better to point out the improbabilities and contradictions in a witness's testimony, in the argument to the jury, than to let him explain them away upon the stand.

Do not give the witness the opportunity to repeat in detail on cross-examination the strong points of his testimony in chief.

Never ask him a question to which he is at all likely to give an answer adverse to your case.

Never introduce new matters into the case by cross-examination, or interrogate the witness about conversations, without having considered what additional testimony his answers may possibly let in.

If the witness have a strong bias or preju-

dice against your client, make this manifest to the jury as soon as possible.

Never dispute with the witness.

Never attack a witness without just provocation, and then let it always plainly appear to the jury that you are in the right, for otherwise they will be likely to sympathize with him. Hence, although it may sometimes be necessary to make the witness angry, nothing will ever justify or excuse any display of petulance or ill-temper on the part of counsel.

Of course the conduct of every cross-examination must be governed in some degree by the circumstances of the case and the particular object to be accomplished by it, and therefore occasions may arise which will at times require a departure from every one of the foregoing rules, excepting the one which forbids putting any question without a distinct purpose. This must be rigidly adhered to under all circumstances.

§ 145. Duties of opposing counsel during cross-examination.—The duty of opposing counsel during cross-examination is to take note of all answers of the witness which may justify or require him to ask an explanation upon the re-examination, and not to interrupt except in cases of absolute necessity; as where the cross-examiner puts a question

which is clearly inadmisible, such as interrogating the witness about matters not connected with the subject of his examination in chief, or cross-examining him as to alleged previous statements in writing, without producing the paper referred to or satisfactorily accounting for its absence. Frivolous interruptions of a cross-examination are not only unjustifiable, but extremely foolish, for, as they always deserve, they frequently get, a sharp rebuke from the court, which is seldom without its weight with the jury, who are very apt to attribute such interruptions to a want of confidence on the part of the counsel making them, either in his case or in his witness, since he evidently fears to trust the latter to take care of himself in the hands of his adversary.

CHAPTER III.

RE-EXAMINATION.

§ 146. Purpose and scope of re-examination.—Although the object of the re-examination is merely to give the witness an opportunity to explain any of his answers given on cross-examination which may be deemed to require it, and its range is therefore strictly limited to matters connected with or relating to such answers, yet it often affords the means of getting out of the witness matters which would not have been admissible upon the examination in chief; as for example, where a witness is asked on cross-examination as to statements made in a conversation which he could not have testified to in chief on behalf of the party who called him, he may nevertheless be required, on re-examination, to give the whole conversation, in order to explain the statements about which he was asked on cross-examination. A great matter in re-examination is to be tolerably certain beforehand as to the nature of the answer which the witness will give to any question you may think of putting to him, and also as

to whether such answer is likely to benefit your case. If at all doubtful upon either point, it is better not to ask the question, as the witness may be unable to give the explanation asked for, or, when given, it may only serve to make matters worse, and new matter thus brought out sometimes proves very damaging to the case of the party by whom it is elicited. Therefore, in re-examination as in cross-examination, the golden rule is to ask nothing except upon a reasonably fair prospect of gaining enough thereby to justify the venture; and the important thing for a counsel to know is when to let well enough alone. In many cases a skillful advocate can with great effect avail himself of the re-examination to make his witness, in the course of his explanation of the answers given on cross-examination, go over again the more important points of his testimony in chief, and thus impress them more forcibly upon the minds of the jury.

§ 147. Duties of opposing counsel during re-examination.—The duty of opposing counsel pending re-examination is to object to leading questions, and prevent the witness from giving evidence of any new matters, not strictly explanatory of his testimony on cross-examination.

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